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WILCOX & CO

No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of Floris Scarborough, Deceased,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco 7-22-31—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

ALVIN GERLACK, Esq., FREDERIC C. BENNER, Esq., 220 Montgomery St., San Francisco, Calif. Attorneys for Plaintiff and Appellee.

GEORGE J. HATFIELD, U. S. Attorney, HERMAN VAN DER ZEE, Ass't U. S. Attorney, U. S. Post Office, 7th & Mission Sts., San Francisco, Calif., Attorneys for Defendant and Appellant.

In the Southern Division of the United States District Court for the Northern District of California.

18494-S

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH, as administratrix of the Estate of Floris Scarborough, deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT—WAR RISK INSURANCE.

Plaintiff complains against the defendant and for cause of action alleges:

I.

That at all of the times herein mentioned plaintiff was, and still is a citizen of the United States and a resident of the Northern District and State

of California and of the City and County of San Francisco therein.

II.

That this action is brought under and by virtue of the War Risk Insurance Act and acts amendatory thereof, including Section 19 of the World War Veterans Act approved June 7, 1924, and amendments and supplements thereto, and is based upon a policy or certificate of War Risk Life Insurance issued under the provisions of the said War Risk Insurance Act, approved October 6, 1917, and acts amendatory thereof by the defendant to Floris Scarborough, deceased, who died on the 20th day of March, 1920.

III.

That on the 25th day of September, 1917, said Floris Scarborough enlisted in the United States Army as a private and was honorably discharged from said Army on April 4, 1919. [1*]

IV.

That Floris Scarborough, deceased, made application to the defendant for and was granted said insurance in the sum of $10,000.00. That in his said application for said insurance, the said Floris Scarborough, now deceased, named as beneficiary of said insurance plaintiff Flora M. Scarborough.

That thereafter there was duly granted and regularly issued to said Floris Scarborough, deceased, by the defendant's said War Risk Insurance Bu-

*Page number appearing at the foot of page of original certified Transcript of Record.

reau, its certificate No. T....., of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said Bureau and the Director thereof, and that during the term of his said service up to and including the date of his discharge, the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and rules and regulations promulgated by the defendant. That said Floris Scarborough, deceased, paid all premiums promptly when the same became due on said policy until discharged.

V.

That on October 3, 1918, while serving the defendant as aforesaid, Floris Scarborough, deceased, contracted certain diseases, injuries and disabilities resulting in and known as gunshot wound, high explosive; shell shock; traumatic neurosis; septicemia; and other disabilities.

That said diseases, injuries and disabilities continuously since April 4, 1919, rendered and up to the time of his death on March 20, 1920, continued to render the said Floris Scarborough wholly unable to follow any substantially gainful occupation and on April 4, 1919, such diseases, disabilities and injuries were of such a nature and founded upon such conditions that at said time it was reasonably [2] certain they would continue throughout the lifetime of the said Floris Scarborough, deceased, in approximately the same degree.

VI.

That the plaintiff Flora H. Scarborough is the mother of Floris Scarborough, deceased.

VII.

That plaintiff on November 17, 1928, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for total and permanent disability and said Veterans Bureau and the Director thereof have refused to pay said Flora H. Scarborough said insurance and on May 29, 1929, disputed said plaintiff's claim to said insurance and disagreed with her concerning her rights to the same.

VIII.

That under the provisions of the War Risk Insurance Act and other acts of Congress relating thereto, plaintiff Flora H. Scarborough is entitled to the payment of $57.50 per month for each and every month transpiring since the death of the said Floris Scarborough, deceased, to wit: the 20th day of March, 1920, up to and including the 3rd day of October, 1938.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten

percentum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act [3] of 1924 as amended.

As and for a second and separate cause of action against the defendant, plaintiff complains and alleges as follows:

I.

That on the 14th day of June, 1929, plaintiff Flora Scarborough was duly and regularly appointed the administratrix of the Estate of Floris Scarborough, deceased, by the Superior Court of the State of California, in and for the County of.

That also on said 14th day of June, 1929, plaintiff Flora Scarborough filed a good and sufficient undertaking as required by said Superior Court and took the oath of office as required by said Superior Court and took the oath of office as such administratrix and did all and such other things as are and were required of her to qualify as such administratrix. That thereafter and on said date, Letters of Administration of said Estate were duly and regularly issued to her by the Clerk of said Superior Court.

That ever since said date, plaintiff Flora Scarborough has been and still is the duly appointed, qualified and acting administratrix of the Estate of Floris Scarborough, deceased.

II.

Plaintiff adopts and re-incorporates in this her second cause of action, Paragraphs I, II, III, IV, V, VI, VII and IX of her first cause of action and makes them a part hereof, the same as if set out in full herein.

III.

That under the provisions of the said Act and other acts amendatory thereof, plaintiff as the administratrix of the Estate of Floris Scarborough, deceased, is entitled to the payment of $57.50 per month for each and every month trans- [4] piring between said October 3, 1918, up to and including the date of death of said Floris Scarborough on March 20, 1920, during all of which time said Floris Scarborough was permanently and totally disabled.

WHEREFORE plaintiff prays judgment as follows:

First: That Floris Scarborough, deceased, from October 3, 1918, up to and including March 20, 1920, was totally and permanently disabled.

Second: That plaintiff Flora H. Scarborough have judgment against the defendant for the monthly installments of said insurance in the sum of $57.50 per month from date of death of said Floris Scarborough, deceased, up to and including the 3rd day of October, 1938.

Third: That plaintiff Flora H. Scarborough as administratrix of the Estate of deceased have judgment against the defendant in the monthly installments of said insurance in the sum of $57.50 for each and every month since the 3rd day of October,

1918, up to and including the time of his death on March 20, 1920.

Fourth: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten percentum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924, as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,
Attorney for Plaintiff. [5]

United States of America,
State of California,
City and County of San Francisco.—ss.

Flora H. Scarborough, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action. That she has read the foregoing Complaint and knows the contents thereof and the same is true of her own knowledge, except as to those matters stated on information and belief and as to those matters she believes it to be true.

FLORA H. SCARBOROUGH.

Subscribed and sworn to before me this 13th day of June, 1929.

[Seal] HENRIETTA HARPER.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 14, 1929. [6]

(Title of Court and Cause.)

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

GEO. J. HATFIELD,
GEO. J. HATFIELD,
United States Attorney.
GEO. M. NAUS,
Assistant United States Attorney.
CHELLIS M. CARPENTER,
Assistant United States Attorney.

Service of the within answer by copy admitted this 13 day of Sept. 1929.

ALVIN GERLACK,
Attorney for Plf.

[Endorsed]: Filed Sep. 13, 1929. [7]

District Court of the United States
Northern District of California
Southern Division

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco,

on Friday, the 15th day of August, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable A. F. ST. SURE, U. S. District Judge.

No. 18494-S

FLORA H. SCARBOROUGH, etc.

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

This case came on this day for trial. Frederick C. Benner, Esquire, appearing as attorney for plaintiff and H. A. Van der Zee, Assistant U. S. Attorney, appearing as attorney for defendant. The attorneys for the respective parties having orally stipulated that a trial by jury be waived; thereupon the Court proceeded with the trial of this case without a jury. * * * [8]

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on to be tried by the court sitting without a jury, a jury trial having been expressly waived by the parties by an oral stipulation made in open court and entered in the record, on the 15th day of August, 1930; Alvin Gerlack, Esq., appearing as counsel and Frederick C. Benner, Esq., appearing as of counsel for the plaintiff; Hon.

George J. Hatfield, U. S. Attorney, and Herman Vander Zee, Esq., Assistant U. S. Attorney for the Northern District of California appearing as counsel for the defendant; whereupon evidence was introduced on behalf of the respective parties hereto and the court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

1. That the plaintiff at the time of the commencement of this action was a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

2. That this action is brought under and by [9] virtue of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended, and is based upon a policy or certificate of war risk insurance issued under the provisions of said acts by the defendant to Floris Scarborough, deceased, who died on the 20th day of March, 1920.

3. That said Floris Scarborough, deceased, enlisted in the United States Army on September 25, 1917, where he served as a private until April 4, 1919, when he was honorably discharged from said service and that during his service he applied for and was granted war risk insurance by the defendant in the sum of $10,000 payable in the event he became permanently and totally disabled while said policy was in force in the amount of $57.50 per

month under the defendant's policy or certificate; and that he paid premiums on said insurance up to and including April 30, 1919, during which time said policy was in force.

4. That in his application for said insurance, said Floris Scarborough, deceased, named as beneficiary of said insurance Flora H. Scarborough. That Flora H. Scarborough is the mother of said Floris Scarborough and the designated beneficiary of said insurance.

5. That on October 3, 1918, while serving the defendant as aforesaid, Floris Scarborough, deceased, contracted certain injuries, diseases and disabilities resulting in and known as gunshot wound, high explosive, shell shock; traumatic neurosis and septicemia, and that said diseases, injuries and disabilities continuously since April 4, 1919, rendered and up to the time of the death of said Floris Scarborough on March 20, 1920, continued to render said Floris Scarborough wholly unable to follow continuously any substantially gainful occupation and on said date such diseases, injuries and disabilities were of [10] such a nature and founded upon such conditions that at said time it was reasonably certain they would continue throughout the lifetime of said Floris Scarborough, in approximately the same degree. That ever since April 4, 1919, said Floris Scarborough, deceased, was permanently and totally disabled at all times from said date up to the time of his death on March 20, 1920.

6. That the plaintiff on November 17, 1928, made application to the defendant through its

Veterans Bureau and the Director thereof for the payment of the benefits of the war risk term insurance certificate herein sued upon for total, permanent disability of said Floris Scarborough, deceased, and said Veterans Bureau and the Director thereof refused to pay plaintiff said insurance and on May 29, 1929, disputed plaintiff's claim to said insurance benefits and disagreed with her concerning her rights to the same prior to the commencement of the above entitled action.

7. That a reasonable attorney's fee to be allowed to Alvin Gerlack, plaintiff's attorney, for his services rendered before this court in this action is ten percentum (10%) of the amount of insurance sued upon and recovered payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of June 7, 1924, as amended.

8. That on June 14, 1929, plaintiff Flora H. Scarborough was duly and regularly appointed the administratrix of the estate of Floris Scarborough, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco, upon which date said plaintiff Flora H. Scarborough filed a good and sufficient undertaking as required by said Superior Court and took the oath of office as such administratrix and did all and such [11] other things as are and were required of her to qualify as such administratrix and that ever since said June 14, 1929, when Letters of Administration of said estate were duly and regu-

larly issued to her by the Clerk of said Superior Court, said Flora H. Scarborough has been and still is the duly appointed, qualified and acting administratrix of the Estate of Floris Scarborough, deceased.

CONCLUSIONS OF LAW.

And as conclusions of law from the foregoing facts, the court concludes:

1. That the court has jurisdiction of the parties and the subject matter of this action.

2. That prior to the commencement of the above entitled action, the defendant disagreed with plaintiff as to her right to said insurance benefits on May 29, 1929, and that said disagreement existed at the time of the commencement of the above entitled action.

3. That the plaintiff Flora H. Scarborough, as administratrix of the Estate of Floris Scarborough, deceased, is entitled to judgment against the defendant in the sum of $57.50 for each and every month beginning April 4, 1919, up to and including the time of his death on March 20, 1920, less an attorney's fee of ten percentum (10%) as herein provided.

4. That the plaintiff Flora H. Scarborough is entitled to judgment against the defendant for the monthly installments of insurance from the date of death of said Floris Scarborough up to and including the time of the commencement of the above entitled action on June 14, 1929, less an attorney's fee of ten percentum (10%) herein provided.

5. That Alvin Gerlack, plaintiff's attorney, is [12] entitled to an attorney's fee of ten percentum (10%) of the amount of insurance sued upon and recovered in this action for his services rendered before this court: and that the defendant United States of America deduct ten percentum (10%) of the amount of insurance sued upon and involved in this action and pay the same to said Alvin Gerlack of San Francisco, California, plaintiff's attorney, payable at the rate of one-tenth of all back payments and one-tenth of all future payments, which may hereafter become due on account of said insurance, said amounts to be paid by the U. S. Veterans Bureau to said Alvin Gerlack out of any payments to be made on account of said insurance to said plaintiff, or to the estate of said Floris Scarborough, deceased.

Dated this 15th day of August, 1930.

A. F. ST. SURE,
District Judge.

Approved as to form only as provided by Rule 22.

GEORGE J. HATFIELD,
U. S. Attorney.
By H. A. VANDER ZEE,
Asst. U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 15, 1930. [13]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,494-S

FLORA H. SCARBOROUGH and Flora H. Scarborough as Administratrix of the Estate of Floris Scarborough, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be tried on the 15th day of August, 1930, before the court sitting without a jury; Alvin Gerlack, Esq., appearing as counsel and Frederic C. Benner, Esq., appearing as of counsel for the plaintiff; Hon. George J. Hatfield, U. S. Attorney, and Herman Vander Zee, Esq., Assistant U. S. Attorney, appearing as counsel for the defendant; and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED that Flora H. Scarborough, as administratrix of the Estate of Floris Scarborough, deceased, do have and recover of the United States of America, the defendant, the sum of Six Hundred Ninety and no/100 Dollars ($690.00) as accrued monthly installments of insurance at the rate of $57.50 per month beginning April 4, 1919, up to the death of the said Floris Scarborough on March 20, 1920.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Flora H. Scarborough, plaintiff, do have and recover of the United States of America, the defendant the sum of Six Thousand Three Hundred Eighty Two and 50/100 Dollars ($6,382.50) as [14] accrued monthly installments of insurance at the rate of $57.50 per month beginning March 20, 1920, up to the filing of the above entitled cause on June 14, 1929.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United States of America deduct ten percentum (10%) of the amount of insurance sued upon and involved in this action and pay the same to Alvin Gerlack of San Francisco, California, plaintiff's attorney, for his services rendered before this court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments, which may hereafter become due on account of said insurance, said amounts to be paid by the U. S. Veterans Bureau to said Alvin Gerlack out of any payments to be made under said insurance contract to the plaintiff herein, or to the estate of said Floris Scarborough, deceased.

Judgment entered August 15th, 1930.

WALTER B. MALING, Clerk. [15]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The United States of America, defendant in the above entitled action, by and through Geo. J. Hat-

field, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 19th day of August, 1930, in the above entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: November 18, 1930.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Nov. 19, 1930. [16]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

COMES NOW the United States of America, defendant in the above entitled cause, being the appellant herein, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for non-suit at the close of plaintiff's evidence herein upon the grounds that plaintiff's evidence had not established a prima facie case and was legally insufficient to sustain a judgment for plaintiff.

II.

The District Court erred in denying defendant's motion for judgment in its favor, made at the close of all of the evidence in said cause, upon the ground that all of the evidence in this case taken together had not [17] established a prima facie case for plaintiff and was legally insufficient to sustain a judgment for plaintiff; and upon the further ground that there was no evidence whatsoever in the record that the deceased insured was permanently and totally disabled from a date prior to the lapse of his policy on May 30, 1919, continuously to the date of his death on March 20, 1920, as alleged in the complaint.

III.

That the District Court erred in directing the entry of judgment for plaintiff herein when the evidence adduced on the trial of this action was insufficient to sustain the judgment.

WHEREFORE, defendant prays that its appeal be allowed, that this assignment of errors be made a part of the record in this cause, and that upon hearing of its appeal the errors complained of be corrected and the said judgment of August 15, 1930, may be reversed, annulled and held for naught;

and further that it be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer, and such other and further relief as may be proper in the premises.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant and
Appellant.

[Endorsed]: Filed Nov. 19, 1930. [18]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: November 18, 1930.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Nov. 19, 1930. [19]

(Title of Court and Cause.)

DEFENDANT'S ENGROSSED BILL OF EXCEPTIONS

To the Plaintiff above-named and to Messrs. Alvin Gerlack and Frederic C. Benner, her attorneys:

You, and each of you, will please take notice that the attached constitutes defendant's engrossed bill of Exceptions.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant. [20]

(Title of Court and Cause.)

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 15th day of August, 1930, the above entitled cause came on for trial; Messrs. Alvin Gerlack and Frederic C. Benner appearing for the plaintiff and Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and H. A. van der Zee, Assistant United States Attorney for said district, appearing for defendant; the said cause was tried by the court sitting without a jury, and the following proceedings thereupon took place.

TESTIMONY OF FLORA H. SCARBOROUGH.

Flora H. Scarborough, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

(Testimony of Flora H. Scarborough.)

Direct Examination.

My name is Flora H. Scarborough. I am the mother of Floris Scarborough and I am a resident of San Francisco. My son enlisted in the army from New York State on September 25, 1917, and was discharged April 4, 1919. I was at Buffalo when he enlisted and when he returned.

My son took out a policy in the sum of $10,000 war risk insurance, the premiums of which were paid up to the date of discharge. The date of discharge was April 4 and the policy was in effect up to May 30, 1919, and the policy lapsed June 1, 1919. I have been appointed the administratrix of my son's estate. (Letters of Administration of said estate issued to Flora H. Scarborough were introduced in evidence and marked Plaintiff's Exhibit No. 1).

For two years prior to the war my son had been working for R. A. Scarborough, another son, on the farm in New [21] York State, about forty miles out from Buffalo. I say my son frequently during those two years; he came home nearly every week-end. He was 5 feet 3 and weighed about 120 pounds immediately before he went into the service, and the general condition of his health was very good. I did not see him during the time he was in the service at all. I saw him when he returned from the service on April 4, 1919. He stayed with me most of the time until I came West, about a month later. I came to San Francisco to keep house for an older son. After that I did not see my son Floris until

(Testimony of Flora H. Scarborough.)
after he died. He died while I was on my way East. When I first saw him when he returned from the army he was completely changed, his color was poor, he was very sallow and his general disposition was so changed that we all noticed it, not only the family but all our friends. Before he went he was very deliberate and very good natured, but when he came back he was easily disturbed, he was not anything like he was before and he would sit down for some time and not say a word, and would not answer any questions you would ask him, and he was very erratic and very nervous and had no appetite and he did not sleep well at all. He used to complain of headaches quite a bit after he came back and when we talked to him about working he said he didn't feel like working. During the month that he was with me he didn't do anything. He was supposed to be staying with me and he would start out in the morning and go down town and at night I would get a telephone message from down on the farm that he was down there, and sometimes he would go out in the field to work and they would not know where he was, and I would telephone down at night that he had come back to Buffalo. We could not depend on him.

I don't know that there was anything else I noticed [22] about his condition during that time. During this month I don't think there was much change in his condition. He certainly did not improve any. When I came to San Francisco I re-

(Testimony of Flora H. Scarborough.)
ceived one letter from him, in July. I had planned to bring him with me when I came but he did not want to come and he wrote me in July that he thought maybe he would later in the Fall, but the letter was not very intelligible. It was so rambling that I immediately wrote to the boys that I thought he should see a doctor. By "the Boys" I mean my other sons that were there at the same time. Later I received a wire calling me East. They had been writing me about his condition. Along in November it became so serious that they wrote me that if I could I had better plan to come home. He died on Saturday night and I arrived in Buffalo early Monday morning. He died in the Marine Hospital in Buffalo. This hospital was taken over during the war as a Government hospital and I think it still is. I did not have a conversation with any of the doctors there in regard to his death. After that I often saw Dr. Mudge. I think he is the doctor who first attended my son.

I first made claim to the Veterans Bureau for this insurance early in April, I think, 1920; about two weeks after he was buried. I wrote them asking the status of his insurance—of course I thought probably it was not paid—I wrote and asked them if it was, and notified them of his death, and they wrote me in answer that it would not make any difference whether it was paid or not, if I could prove that he died from his war experience, it was payable just the same. I submitted the affidavit

(Testimony of Flora H. Scarborough.)
from Dr. Mudge. Just prior to this action I made a claim against the Bureau in legal form and a disagreement has been admitted. I have employed the services of Mr. Gerlack and Mr. Benner to represent me. [23]

Cross Examination.

I read the complaint that was filed in this suit. I must have done so. I never sign papers unless I read them. The complaint recites in paragraph 7 that I made this claim for insurance on November 17, 1928. I made this claim on the assumption that my son's insurance had been continued by him after he left the service. I hope to collect because I thought his policy was still alive after he left the service. The first time I made any claim upon the Veterans Bureau for payment by reason of permanent total disability acquired while in the service, was in 1928.

The last time I saw my son before his death was September 25, 1917, when he took the train for the camp. That was before he entered the war. I did not see him then again until he came home, about April 6, 1919. I last saw him immediately next prior to the time of his death, the first week in May, 1919. He was in Buffalo when I left to go home. He came to the train and saw me off. I know nothing concerning the injury which caused his death.

DEPOSITION OF R. A. SCARBOROUGH.

The deposition of R. A. Scarborough, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is R. A. Scarborough. I am forty-five years old. I reside at Middleport, New York. I am a machinist by occupation. I am a brother of Floris Scarborough, the deceased insured. I saw him practically every day during the year previous to his entering the United States Army on September 25, 1917. He was living with me in Johnson Creek, New York, at the time he entered the army in 1917. He was a farmer and worked for me on the farm. I saw him on or about September 25, 1917, when he entered [24] the army, and as I observed it, his health was good at that time. I have never known him to have any trouble with his health previous to entering the service and he lived with me from 1913 until he entered the service. I saw him immediately after his discharge from the army at Middleport, New York, as soon as he arrived home from Long Island. As I observed it, the condition of his health at that time was poor. He wasn't able to do anything. He looked all right, a little pale perhaps. He complained of weakness. When he came home he said he was going to try to farm and was going at it strong, but he couldn't do anything. Sometimes he would do the chores. Some days he would work a half day and some days only

(Deposition of R. A. Scarborough.)

two or three hours. He couldn't go to work and stick to it. He couldn't do any work.

As to his condition in April, 1919, compared to what it was in October or November of 1919, that is a hard question for an ordinary person to answer. He was thinner in October and November. He couldn't work. There was no improvement in his health during that time. As far as I observed, it was the other way if anything. To my knowledge he did no work after his discharge from the army. He did not work steadily, a half day at a time, quarter of a day, some days not at all. He made his home with me—all three of us boys. I can't remember if he worked for anyone else besides us boys or not. I can't recall any instance; of course that is ten or twelve years ago. He was sick. He was not able to work. He complained of being weak, first in his leg and then in his arm; sometimes one leg, sometimes the other; sometimes one arm, sometimes the other. When he entered the army he was able to go out and do anything, was stronger and able to do anything, and when he came out of the army he was not able to do anything. He had a scar on his leg right by his ankle. [25]

Cross Examination.

I saw my brother practically every day prior to his entering the United States Army in September, 1917. He lived with me at the time and worked

(Deposition of R. A. Scarborough.)
with me at that time. I paid him wages. Four or five years prior to September 25, 1917, he worked here in Buffalo but I couldn't say off-hand what place.

At the time he entered the army he was 5′ 4″ tall. I can't remember his weight. At that time he walked straight and upward and was not bent or stooped in any way. I stated that at the time he entered the army he made no complaints regarding his health and for that reason I state he was in good health at that time. If he had gone to a doctor, I would have taken him. Prior to September 25, 1917, I saw him every day he worked on my farm. Every day he was under my surveillance. The farm consisted of 100 acres. To the best of my knowledge and belief he was out working on the farm. At times he was at one end of the farm and I was at the other end. He came to Middleport, New York, as soon as he got out of the army, within a day or two. I said he looked a little pale. I didn't notice any difference in his weight, probably a variance of a few pounds. I noticed no difference in his stature or his walk. He started work around the farm right away. I agreed to pay him a salary but never did. He never got started to work. He would work on the farm for a few hours, do the chores, and after a while I would find him resting. He stayed with me quite a few days and one day he said "Well, I can't do much around here, guess I will go see mother." Mother

(Deposition of R. A. Scarborough.)
was in Buffalo at that time. While he was with me he worked a few hours a day. He stayed with me for several months and then returned to our mother. After that he went to Lee [26] and Marshall, our brothers. There was a period of time when he was away from my place but it would be hard to say how long as I would see him every little while. I say he could not do much work because he was weak. During the first few months after he returned from the army he did not see a doctor, to my knowledge. The first time he consulted a doctor to my knowledge was the 16th day of December. I know he injured his thumb. The thumb of one hand. I don't remember which one. The night I took him to the doctor the hand was not cut, there were no bruises, but practically the whole hand was swollen some. This was the night I took him to Dr. Mudge. I can not say what time of day it was. He was staying with our brother Lee at the time he was hurt. He was not living with me then and I couldn't say how he was hurt.

I saw him occasionally between October and December, 1919. He was staying with me practically all that time. When I used to see him I would say "John (we used to call him John), you are getting thin". I don't know that he was going down so very much. His color was normal up to the time he went to the hospital. I didn't observe that he walked differently than when he came back from the army. When I first saw his hand I couldn't say exactly

(Deposition of R. A. Scarborough.)
whether the thumb was larger than the thumb on the other hand or not.

My brother had no independent income after he came back from the army. For the work he did for me I gave him money to spend. I didn't give him any stated income, I just gave him money when he wanted it. He stayed with me between one week and ten days and then went to Buffalo. Three weeks later he returned to me and stayed a week or ten days. Then he went to my other brother's. Marshall, from Carlton, came up and he said he guessed he would go [27] down and see him a few days. Well, from then up until some time in June or July, he was back and forth between Marshall's place and my place. In that time I couldn't say whether he worked or not. Marshall's occupation at that time was selling automobiles and running a small greenhouse. From June until October he went to Lee's, sometime in June or July. Lee lives in Arcade. I don't know what his occupation was at that time. I don't know whether Floris worked out there or not.

DEPOSITION OF DR. MURRAY F. MUDGE.

The deposition of Dr. Murray F. Mudge, a witness on behalf of plaintiff, was read in evidence and the same reads as follows:

My name is Murray F. Mudge. I am sixty years of age and a physician residing at Middleport, New

(Deposition of Dr. Murray F. Mudge.)

York. I was licensed to practice medicine by the State of New York in 1895, and I am so licensed at the present time. I am a graduate of Niagara University and have been practicing medicine continuously since my graduation from Medical School. During the war I served as Captain in the Medical Corps of the United States Army from October 24, 1917, to August 16, 1919. I was assigned to Base Hospital at Camp Dix until May, 1919, and then to Camp Infirmary in Camp Dix. I had charge of all the contagious diseases for a while and also was in the Orthopedic Department. I am a Lieutenant Colonel, Medical Corps, in the Officers Reserve Corps.

I knew Floris Scarborough ever since he was four or five years old. I have been their family physician at Middleport, New York. His health prior to entering the service was good, so far as I know. I never treated him for any serious condition. I saw him frequently unprofession- [28] ally. After his discharge from the army he came to my office on December 18, 1919, for consultation. The only thing I can remember treating him for previously was for poison ivy and that was probably in 1914 or 1915. He came to see me December 18, 1919, about his hand and remained under my care until March 11, 1920. I made a diagnosis of injury to the thumb, swollen, and general run down condition. The last time I rendered any treatment to him was March 11, 1920. I did not treat him at his death. I believe there was a connection between

(Deposition of Dr. Murray F. Mudge.)
the septecemia, which caused his death, and previous disabilities. I did not see him from the date of his discharge until December and it would be impossible for me to state his condition at the time of his discharge from the army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March), I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime.

Cross Examination.

I was in the Orthopedic Department of the Base Hospital about three months and a half. I did everything in the orthopedic line, bone fractures, split joints etc. Septecemia did not come under the orthopedic service. That would be for the medical service.

Floris Scarborough had a very bad case of poison ivy and he was susceptible to poison ivy. There are some persons more susceptible to poison ivy than others. In this particular case this boy had a very severe case in 1914 and 1915. When he came to my office in December, 1919, he made a complaint about the condition of his hand. His thumb was [29] swollen, he had a contusion on the hand. It appeared as a pressure injury to the thumb. The

(Deposition of Dr. Murray F. Mudge.)
thumb was swollen around the injury and was much larger than the other thumb. I couldn't say which hand it was. I decided that he had a septic infection as the result of the cut on the thumb. If there is a septic condition in a person, a bruise would be more apt to develop a local septic condition. A septic condition could arise from some poisoning in a person's system. In my opinion the septic condition might have been a direct result of the contusion of the thumb.

I never decided that this man had traumatic neurosis. I decided that Floris Scarborough was permanently and totally disabled within the first month after treatment. It was a question of how long he was going to live. He had septecemia until he died. A person might be able to work and follow a gainful occupation even though he had septecemia, if nothing came along to disturb that latent condition. Septecemia would not lay dormant for a great length of time, particularly if a person was subject to hard labor or conditions that would tend to bring down his condition. If this boy got over the severe case of blood poisoning, there still might have existed a septic condition, and with that condition existing he still could follow a gainful occupation. It is possible that he might get over the septecemia. I did not examine his heart and lungs at the time he came into my office. I just treated his thumb.

DEPOSITION OF CHARLES SCARBOROUGH.

The deposition of Charles Scarborough, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is Charles Scarborough; age 40; address 258 Stockbridge Avenue, Buffalo, New York; occupation, [30] accountant. Floris Scarborough was my brother. I did not see him for about seven years prior to his entering the service. I had never known him to have any trouble with his health previous to entering the service except ordinary children's diseases. After his discharge from the army on April 4, 1919, I first saw him about two weeks later at Buffalo, New York. His health, as I observed at that time was poor. He was thinner than I had seen him last. He gave me the impression, as so many soldiers that I have seen, that he had been shell shocked, he was irritable, erratic; he seemed to jump from one thing to another. The only thing he ever complained of to me was that he could not sleep at night. He said he had dreams. I did not pay so much attention to that because I thought it was a reaction from war experience. He was very funny, for instance, he would mention to me "let's go down to the corner and get a dish of ice-cream" and get half way down and before we got down there he would suggest something else and start up the other way, and he acted funny, is the only way I can describe it.

To my knowledge he had always been healthy and strong, always sort of an easy-going, deliberate

(Deposition of Charles Scarborough.)

sort of a fellow, and when I saw him he was jumpy, erratic, nervous, and got mad awfully easy. Naturally I thought there was something wrong with him. I did not see him in October and November, 1919. I did not see him at the time he entered the army.

Cross Examination.

Prior to April, 1919, I had last seen Floris Scarborough seven or eight years previously at Buffalo. He was going to school then. I left Buffalo at that time. I did not see him between seven and nine years prior to April, 1919. During that time I was in California and [31] Oregon. He would be about fifteen when I last saw him because he was still in school. In April 1919 I saw him for about a week or ten days. He was about twenty-four years old. He seemed much thinner than when he was fifteen. He was of short and stocky build.

TESTIMONY OF DR. SAMUEL E. WELFIELD.

Dr. Samuel E. Welfield, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

I am a physician and surgeon licensed to practice by the State of California on June 6, 1918. I took medical work at the College of Physicians and Surgeons and Southern California University. At the present time I am specializing in industrial

(Testimony of Dr. Samuel E. Welfield.)

medicine. I am quite familiar with the disease of septicemia in its various complications. Septicemia means a general infection of the system, having its entry through the blood stream, primarily some source of infection, such as having a wound in any part of the body. It is usually caused by a germ which is a virulent pusproducing germ, and usually found in infected wounds; these germs may get into the blood stream and produce septicemia in either active or latent form. Septus merely has reference to the condition of the infection—a person having septicemia has a septus, a person having an infected wound we would say that he was in a condition of septus. In the latent condition of septus it may go on for years, it may go on for three, or four or five years even, and then have an acute effect on some organ such as the heart or some other organ in the body and there set up an acute infected process. There are degrees of septus condition. The most common physical effect of septicemia would be the feeling of weakness, loss in weight, decrease in the red blood cells, increase in the whites, and a general feeling of not being well or that something is wrong. [32]

It is possible for a person to have septicemia caused by some point of infection, such as an injury, and have that condition continue in the body, although the point where it originally was is healed; it does not happen very frequently, but it does happen. It might be possible that a person in October, 1918, received an injury to his leg in a

(Testimony of Dr. Samuel E. Welfield.)
form of two wounds from shrapnel and that in April of the following year he had some of the symptoms of septicemia as loss of weight and general run down condition and at the time the wound, as far as external appearance is concerned, is completely healed, and that the condition of septicemia might be traceable to the original injury. In other words, a person might have septicemia after the wound that caused it is healed. If a person had a condition of septus or septicemia, either an illness of some kind or another injury would be likely to bring that to a head. If a person has an injury to a thumb and within a month the thumb starts to swell and the hand swells and it becomes progressively worse, there is no limit to the time for the condition of septicemia to exist. It might run on for several years, even after it had showed itself externally. If a person is found to have a slightly pale color and a general weakness, irritability and nervousness, a slight loss of weight, a slight stooping condition, apparent inability to exert himself, if he suffers from bad dreams, poor appetite and inability to sleep, these are symptoms of a septic condition. These symptoms would be enough in itself to diagnose it a condition of septus, provided there was no external evidence of any other disease.

Cross-Examination.

In answer to the long hypothetical question I said it was possible in the case given to me that sep-

(Testimony of Dr. Samuel E. Welfield.)

ticemia might [33] be traceable to the original wound received some years before. So far as an individual case is concerned, I would not be able to state that positively unless I had made a physical examination. That answer was based only upon the hypothetical question. Not having seen the individual, of course it would be impossible for me to say that such a thing positively occurred, although it could occur. As a matter of fact it would have been most unusual, rather than usual. It is not the usual case, but I can only give my opinion based by experience. Considering the symptoms that were mentioned in the hypothetical case, it would be possible to trace such septicemia back to the original injury in the leg. The septicemia infection being in the thumb, that would also be an unusual case, rather than the usual. The symptoms given me, as assumed in the hypothetical question, might indicate a great number of other complications in addition to septicemia.

I am engaged in general practice. I get perhaps ten times as many cases of septicemia as the average doctor does who is in general practice. I treat industrial injuries. My fee in this case is $100.00 and it has not been paid.

Redirect Examination.

It is possible for septicemia to be brought into the body through an injury to the thumb that does not break the skin but causes a blood blister. A con-

(Testimony of Dr. Samuel E. Welfield.)
dition of tonsilitis is not in any way a wound. It is merely an infection of the gland and that involves the blood stream through the throat. A blood blister, or a hematona, a small blood tumor, producing a ruptured blood vessel caused by a wound of some kind, will sometimes become infected instead of being absorbed. Absorption is the usual thing. [34] The process of infection of a *m*ematona is the usual thing but we get them just the same. The blister need not be broken. I have seen that in about one out of fifty cases of hematona. Hematona is a blood clot from breaking a blood vessel and if we pick the skin the blood is underneath the skin and then instead of being absorbed as it usually is, the usual case is for the thing to become infected and we have to operate on it. If a person is in a healthy condition, in the usual case, it would be absorbed. Septus is the condition of the body; septicemia is the disease. If a person had septicemia and had this blood blister, the possibility of absorption would be that much less; if a person had a healthy normal blood, the probabilities are that it would be absorbed.

As to the cure for septicemia, it is a very difficult thing. First of all you have to try to get at the primary cause. If there is an acute infected process, the idea is to clear that up and abate the infection of the blood stream, placing the patient under a condition of rest, very careful diet, and treating him the same as you would a T. B. case or any other case of infection.

(Testimony of Dr. Samuel E. Welfield.)

Recross Examination.

In my experience in handling these cases of septicemia, I would say within my ten years' experience I have probably had half a dozen cases where the septicemia was caused by a new injury aggravated by an old well-healed wound or injury caused at least one year prior to the later wound which caused infection. The total number of cases treated by me during that time, conservatively, is 2,000, and the average where septicemia was so caused would be about six out of two thousand. [35]

Mr. VAN DER ZEE: I am going to move for a non-suit. I want to state the grounds of my motion, that the allegations of the complaint have not been established, even to the point of plaintiff making out a prima facie case under the evidence which she has offered. I refer particularly to the allegations that the disability complained of and the permanent total disability upon which the action is here based is alleged to have occurred prior to the discharge of the plaintiff from service, which is stated in the complaint to be April 4, 1919. The evidence of the plaintiff shows the fatal disease to have been incurred sometime very shortly prior to March, 1920, the latter date being the date of death. From the nature of the disease it is apparent that blood poison is a disease which runs its course in a case like this one in a very short time, and there certainly is no evidence offered by the plaintiff which connects the fatal injury to a time prior to April 4,

(Testimony of Dr. Samuel E. Welfield.)
1919, the time of the discharge of the deceased from service, or May 1, 1919, the time of the lapsation of the policy. There is absolutely no evidence whatsoever as to the disease occurring prior to that date, or any date prior to the month of March, 1920. Now, it being incumbent upon the plaintiff to prove not only the occurrence of the disease, but the condition of total permanent disability as of a date prior to the date of lapsation of the insurance on May 1, 1920, there is a total failure of the evidence to even establish a prima facie case, and I therefore move for a non-suit in favor of the Government on those grounds.

The COURT: Denied.

Mr. VAN DER ZEE: Exception.

Thereafter the following evidence was introduced on behalf of the defendant, The United States of America. [36]

The

DEPOSITION OF DR. G. S. PHILBRICK

was then offered in evidence without objection and the same reads as follows:

Direct Examination.

My name is Dr. G. S. Philbrick, of 8125 Buffalo Avenue, Niagara Falls, New York. I am a physician and surgeon licensed to practice medicine in

(Deposition of Dr. G. S. Philbrick.)

New York State. I was licensed to practice medicine July 2, 1917. I graduated from Creighton Medical College, Omaha, Nebraska, June 2, 1917, and have practiced medicine since 1917, specializing in surgery. I have done a great amount of surgical work. I was connected with the United States Marine Hospital, Buffalo, New York, from September, 1919, to June, 1927, as Clinical Director. Floris Scarborough was admitted to that hospital on March 11, 1920, during my period of service there. I made an examination of him upon his admission there. The physical examination report dated March 11, 1920, which you hand me, represents the true condition of Floris Scarborough on that date. The military history and present complaints recorded in that examination were furnished by Floris Scarborough himself. The physical findings made by me upon that examination were: he had a two-inch well-healed scar over outer aspect of left leg, about two inches above external malleolus; one and a half inch well-healed scar over outer aspect of left leg six inches above external malleolus. Has no pain, no limitation of motion, no complaint from wounds, no bone injury. My diagnosis of the patient's condition following upon the examination of March 11, 1920, was: blood poisoning right arm; old gunshot wound left leg; septicimia and contusion of thumb on right hand. He was a patient at the U. S. Marine Hospital about nine days. The date of his [37] death was March 20, 1920. With regard to his

(Deposition of Dr. G. S. Philbrick.)
physical condition as I observed it, apart from the report of physical examination, this man had evidently been suffering from blood poisoning in his right arm for a number of days and when admitted his condition was so grave that we felt it was an emergency, otherwise he could not have been admitted to a Government hospital for this intercurrent infection.

With regard to the gunshot wound of the left leg, these two scars on the outer aspect of his leg which were due to a gunshot wound, were completely healed, soft, pliable and non-adherent, and caused no limitation of motion or function of his leg. There was nothing about this gunshot wound of itself which should have caused any disability. In my opinion the gunshot wound in no way contributed either directly or indirectly to the condition from which Mr. Scarborough was suffering at the time of his admission to the U. S. Marine Hospital, Buffalo, New York, and subsequently thereto. The gunshot wound on the outer aspect of the left leg neither directly or remotely had anything to do with the septicaemic condition from which he was suffering upon admission to the said Marine Hospital or subsequently thereto. In my opinion, from the condition of the gunshot wound at the time of my examination of it, on March 11, 1920, and from my subsequent examinations and observations of it, it is not reasonable to presume that this gunshot wound has anything to do with the condition from

(Deposition of Dr. G. S. Philbrick.)
which Mr. Scarborough was suffering upon his admission to the U. S. Marine Hospital. The cause of his death, in my opinion, was general septicemia due to and complicating the infection in his right arm.

I have had a good many cases in my experience [38] involving conditions similar to those in this case. In my opinion and from my observation of the patient, and from my examination of his and my experience in such cases, I believe that had adequate surgical drainage been established early, that this man would have recovered. Upon my examination I did not find any disability other than those of septicemia and gunshot wound. In my opinion if Mr. Scarborough had not been afflicted with septicemia, from my observations and examination of him, there was no physical defect apparent which would have rendered it impossible for him to have engaged in a gainful occupation and followed it continuously. Under these conditions he could have engaged in any occupation for which he was educationally qualified or for which he might have been trained by experience.

The physical examination report made by Dr. G. S. Philbrick, March 11, 1930, was here offered and received in evidence and marked Government's Exhibit "A" and reads as follows:

"Report of Physical Examination
Date March 11, 1920 JAN, Notary Public.
Place Buffalo, New York.
Claimant's name Scarborough, Floris

(Deposition of Dr. G. S. Philbrick.)

Service organization and rank Private, Infantry USA

Present address: Middleport, N.Y. R.F.D.

Age 25 Principal previous occupation: Farmer Color, White—Single.

Brief Military History of claimant's disability: Has never filed claim for compensation. GS Wound left leg, in hospital 4 months. Discharged April 4, 1919.

Present complaint: Infection of right thumb caused by cut on harness while harnessing horses on the farm 3 months ago. General weakness, no complaint from wounds in leg. [39]

Physical examination: Two inch, well healed scar over outer aspect left leg, about 2 inches above external malleolus. One and a half inch well healed scar over outer aspect of left leg, six inches above external malleolus. Has no pain, no limitation of motion, no complaints whatsoever from wounds, no bone injury.

Diagnosis:

2067 GS Wound of leg (left)
1082 Septicaemia
1737 Contusion of thumb, right hand.

Disability: State whether temporary partial:

Prognosis: Grave

Is claimant able to resume former occupation: No. Do you advise it: NO.

Is claimant bed ridden: Yes. Is claimant able to travel: No.

(Deposition of Dr. G. S. Philbrick.)

Do you advise hospital care: Yes. Will claimant accept hospital care: Yes.

In your opinion is disability due or traceable to service: No.

The claimant has a vocational handicap for his principal previous occupation which is MAJOR.

Why? State vocational handicap referred to in No. 18.

Is his physical and mental condition such that vocational training is feasible. No.

Did you examine the man yourself:

G. S. Philbrick, P. A. Surgeon (R) What disposition made: Hospitalized.

Any other remarks: Died March 20, 1920.

Auth. Form 4505—dated March 1st, 1928.

Pursuant to auth. in Sec. 8 W. W. V. Act.

A true copy

A. S. Thomson—Reg. Atty. U. S. Veterans Bureau.

Cross Examination.

At the time when I examined Floris Scarborough I considered that he was permanently and totally disabled from following continuously a substantially gainful occupation as he was suffering at that time with blood poisoning in his right arm, from which he died.

Mr. VAN DER ZEE: I want to make a motion for judgment upon all of the evidence, upon the ground that the evidence both for the plaintiff and

(Deposition of Dr. G. S. Philbrick.)

for the defendant, taken together, does [40] not justify a finding of the truth of all of the allegations of the complaint.

The COURT: Denied.

Mr. VAN DER ZEE: Exception.

The COURT: The judgment of the Court is that plaintiff have judgment as prayed for together with attorney's fees.

Mr. VAN DER ZEE: May we have an exception to that also, your Honor?

The COURT: Yes.

Dated: February 26, 1931.

ALVIN GERLACK,
Attorney for Plaintiff.

GEO. J. HATFIELD V.D.Z.,
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant. [41]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

A. F. ST. SURE,
United States District Judge.

Dated: May 6, 1931.

It is so stipulated:

ALVIN GERLACK,
Attorney for Plaintiff.

GEO. J. HATFIELD, V.D.Z.,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed May 7, 1931. [42]

(Title of Court and Cause.)

STIPULATION RE SENDING EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto that each of the exhibits introduced in evidence in the trial of the above-entitled action by plaintiff may be sent to the Circuit Court of Appeals for the Ninth Circuit to be used in the appeal of the above-entitled action by the said Appellate Court and to be deemed part of the bill of exceptions.

ALVIN GERLACK,
Attorney for Plaintiff.

GEO. J. HATFIELD,
United States Attorney.
Attorney for Defendant.

It is so ordered:

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed May 18, 1931. [43]

(Title of Court and Cause.)

PRAECIPE

To the Clerk of Said Court:

Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Answer to Complaint.
3. Minute order waiving jury.
4. Petition for Appeal.
5. Order Allowing Appeal.
6. Assignment of Errors.
7. Citation on Appeal.
8. Engrossed Bill of Exceptions.
10. Stipulation re sending exhibits to Circuit Court.
11. Findings of Fact and Conclusions of Law.
12. Judgment.
13. This praecipe.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

Service of the within praecipe by copy admitted this 19 day of May 1931.

ALVIN GERLACK,
Attorney for Plff.

[Endorsed]: Filed May 18, 1931. [44]

(Title of Court and Cause.)

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 44 pages, numbered from 1 to 44 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $16.40; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of May, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk United States District Court
for the Northern District of California. [45]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States of America.

To Flora H. Scarborough and Flora H. Scarborough as Administratrix of the Estate of Floris Scarborough, deceased,

Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 18th day of November, A. D. 1930.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Nov. 19, 1930. [46]

[Endorsed]: No. 6479. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Flora H. Scarborough and Flora H. Scarborough as Administratrix of the Estate of Floris Scarborough, deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 28, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6479

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of Floris Scarborough, Deceased,
Appellee.

BRIEF FOR APPELLANT.

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Assistant United States Attorney,
Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco

Subject Index

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No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of Floris Scarborough, Deceased,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court in favor of plaintiff below, upon a policy of War Risk Insurance issued to a deceased veteran of the World War during his lifetime. The plaintiff below appeared as administratrix of the estate of the deceased veteran, and also as the beneficiary named to receive the benefits of the policy accruing after the death of the veteran.

The case was tried to the Court sitting without a jury and the judgment runs to the plaintiff below on the second cause of action as administratrix of the estate of the deceased veteran for those benefits of the policy accruing for permanent total disability prior to his death and to her personally on the first cause of action for those benefits accruing on the policy since the death of the deceased insured, as beneficiary.

The appeal is from respective orders of the Court below denying defendant's motion for a nonsuit, denying defendant's motion for judgment and directing the entry of judgment for plaintiff.

The deceased veteran in this case was discharged from service April 4, 1919, and his policy of insurance lapsed for non-payment of premiums May 1, 1919. He died March 20, 1920, the cause of death being septicaemia, or blood poisoning, resulting from an infection of the right thumb.

ARGUMENT.

THE MOTION OF DEFENDANT FOR A NONSUIT AT THE CLOSE OF PLAINTIFF'S EVIDENCE SHOULD HAVE BEEN GRANTED.

At the conclusion of plaintiff's evidence, defendant moved for a nonsuit (Tr. p. 39) upon the grounds that plaintiff had not made out a prima facie case, in that there was no evidence of permanent and total dis-

ability incurred prior to May 1, 1919, the date upon which the policy lapsed; the evidence being confined to a history of the fatal illness culminating in the death of the veteran on March 20, 1920, which illness was acquired a short time before the date of death.

A resumé of plaintiff's evidence will reveal the merit of the motion for a nonsuit.

Plaintiff, the mother of the deceased, testified that she saw the deceased at the time of his discharge, that he remained with her for about one month and that she never again saw him alive (Tr. p. 21); that during this period of one month he did not remain with her constantly but made trips to the nearby farm of his brother, where he worked in the fields (Tr. p. 22).

Plaintiff made claim for insurance for the first time November 17, 1928, in the belief that payments of premiums had been promptly made by the deceased until his death on March 20, 1920 (Tr. p. 24).

R. A. Scarborough, brother of the deceased, testified by deposition that the deceased visited him and the other brothers, that deceased did the farm chores (Tr. p. 25), and that deceased was with him intermittently between the date of discharge from the army and the time of his death; that he gave deceased money when he needed it, in return for work about the farm (Tr. p. 29).

Dr. Murray F. Mudge testified for plaintiff that the deceased came to him for medical treatment Decem-

ber 18, 1919, at which time the doctor made a diagnosis of "injury to the thumb, swollen, and general rundown condition" (Tr. p. 30); that he did not treat the deceased at the time of his death (Tr. p. 30), and that at the time of his first examination, December 18, 1919, the deceased was not permanently and totally disabled (Tr. p. 31); finally, that "a person might be able to work and follow a gainful occupation even though he had septicaemia, if nothing came along to disturb that latent condition. If this boy got over the severe case of blood poisoning, there still might have existed a septic condition, and with that condition existing he still could follow a gainful occupation" (Tr. p. 32).

Charles Scarborough, brother of the deceased, saw the latter two weeks after his discharge from the army; he had not previously seen deceased since the latter was a schoolboy (Tr. p. 34).

Dr. Samuel E. Welfield, a doctor who had never seen the deceased nor examined him, testified that septicaemia might be traceable to an earlier injury or wound but that as far as an individual case is concerned, he would not be able to state so positively, unless he had made a physical examination; that such a connection would have been most unusual, rather than usual; that it would be an unusual case to connect the septicaemia infection in the thumb with a previous injury in the leg; that out of approximately 2,000 cases of septicaemia treated by him, in only six

cases was the septicaemia caused by a new injury aggravated by an old well-healed wound or injury.

Thus it is seen that a summary of all of plaintiff's evidence does not reveal the existence of the condition of permanent and total disability between the date of lapse of the policy, May 1, 1919, and the date of death on March 20, 1920. Without proof of such disability, no recovery can be had, because no policy was in existence at the time of the subsequent death of the veteran.

Plaintiff's evidence shows no more than that the veteran died as a result of blood poisoning caused by an infection resulting from an injury to his thumb incurred while harnessing horses on the farm (Tr. p. 44). Whether at the time of this injury and resultant infection he had a condition which aggravated the new injury is immaterial, because such a condition, by the testimony of plaintiff's own medical witness, would not be permanently and totally disabling (Deposition of Dr. Murray F. Mudge, Tr. p. 32).

Furthermore, there is no evidence that deceased actually suffered from such latent condition of septus, or poisoning, this being a matter of pure speculation, according to the testimony of plaintiff's other medical witness (Dr. Welfield, Tr. p. 39).

Under either alternative, therefore, that deceased did have such a latent condition, or that he did not, the proof of permanent and total disability utterly failed.

Under this state of the evidence, the doctrine laid down by this Court in *U. S. v. Barker,* 36 F. (2d) 556, is clearly applicable:

> "From the facts shown, to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms. Not without hesitation we sustained the right of plaintiff to recover in the Sligh Case (31 F. 2d. 735), but to go further and yield to the contention of the plaintiff here would be to ignore one of the material limitations of the policy."

The burden being on plaintiff below to establish by substantial evidence that permanent and total disability existed prior to the lapse of the policy on May 1, 1919, her failure to present such evidence was fatal and the nonsuit should have been granted.

Blair v. U. S., 47 F. (2d) 109 (C. C. A. 8);
U. S. v. Lawson, 50 F. (2d) 646, 650, 651 (C. C. A. 9);
U. S. v. McLaughlin (Oct. 1931 term C. C. A. 8);
U. S. v. Thomas (C. C. A. 4, decided October 13, 1931).

THE MOTION OF DEFENDANT FOR JUDGMENT IN ITS FAVOR SHOULD HAVE BEEN GRANTED.

The government offered in evidence the deposition of Dr. G. S. Philbrick, who examined and treated the deceased during his fatal illness (Tr. p. 41). The deceased complained of an infection of his right thumb

caused by a cut while harnessing horses on the farm three months previously (Tr. p. 44). The examination was made March 11, 1920, nine days before the death of the veteran. This doctor, in attendance upon the deceased at the time of his death, testifies concerning the previous injury as follows (Tr. p. 42):

> "There was nothing about this gunshot wound of itself which should have caused any disability. In my opinion the gunshot wound in no way contributed either directly or indirectly to the condition from which Mr. Scarborough was suffering at the time of his admission to the U. S. Marine Hospital, Buffalo, New York, and subsequently thereto. The gunshot wound on the outer aspect of the left leg neither directly or remotely had anything to do with the septicaemic condition from which he was suffering upon admission to the said Marine Hospital, or subsequently thereto. In my opinion from the condition of the gunshot wound at the time of my examination of it, on March 11, 1920, and from my subsequent examinations and observations of it, it is not reasonable to presume that this gunshot wound had anything to do with the condition from which Mr. Scarborough was suffering upon his admission to the U. S. Marine Hospital. The cause of his death, in my opinion, was general septicaemia due to and complicating the infection in his right arm."

The doctor goes on (Tr. p. 43) to say that the deceased would have recovered had adequate surgical drainage been established early, and that apart from the fatal illness, the deceased was suffering from no disabling physical defects.

Appellant has quoted from this testimony at length, because of its importance as the only evidence directly bearing on any possible connection between the fatal illness and the previous injury. It is likewise important as corroboration of plaintiff's own medical witness, Dr. Mudge, in testifying (Tr. p. 31) that deceased was not permanently and totally disabled on December 18, 1919.

CONCLUSION.

A fair view of the evidence discloses a case of death from blood poisoning in the thumb incurred while deceased was actually employed at farm work, long after the policy had lapsed and unconnected with any existing physical condition. Nowhere in the record is there substantial evidence to the point that during the period between the lapse of the policy on May 1, 1919, and the date of death on March 20, 1920, the veteran in this case was permanently and totally disabled. Plaintiff's own evidence, indeed, particularly his medical evidence, establishes just the opposite.

A finding of the Court must be based on substantial evidence. Mere probabilities or speculation or inferences builded upon inferences are not evidence.

> *United States v. Lawson*, 50 F. (2d) 646, 651;
> *Sturtevant v. U. S.*, 36 F. (2d) 562, 563.

It is respectfully submitted that the orders appealed from were erroneously made and that the learned trial

court was in error in directing the entry of judgment for plaintiff below.

Respectfully submitted,

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No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

3

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of FLORIS SCARBOROUGH, Deceased,
Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Appellant's sole contention on this appeal is that the evidence is insufficient to sustain the judgment. Therefore the only question to be determined is, does a careful examination of the record reveal sufficient evidence upon which the findings and judgment can be based?

THE FACTS.

The action is brought upon two counts by Flora H. Scarborough the mother of Floris Scarborough, deceased, a soldier who enlisted on September 25, 1917 and was honorably discharged on April 4, 1919. During his service he was granted a war risk insurance policy in the sum of Ten Thousand Dollars ($10,000.00) and paid premiums until his discharge, the insurance being in force up to and including midnight of May 31, 1919 by reason of the thirty-one day grace period. While in the service, and on October 31, 1918, he received certain gun-shot wounds on the battle field in France for which he was hospitalized four months. For some unaccountable reason, the Government failed to produce the Adjutant General's records, showing his physical condition at the date of discharge. The trial court, not having the benefit of these Government records, had to rely upon other and somewhat less satisfactory evidence, as to his exact treatment while in the service.

Mrs. Flora H. Scarborough, the plaintiff and the mother of the deceased, testified as follows (R. 21):

> "My son enlisted in the army from New York State on September 25, 1917 and was discharged April 4, 1919. I was at Buffalo when he enlisted and when he returned.
>
> My son took out a policy in the sum of $10,000 war risk insurance, the premiums of which were paid up to the date of discharge. The date of discharge was April 4 and the policy was in effect

up to May 30, 1919, and the policy lapsed June 1, 1919. I have been appointed the administratrix of my son's estate. (Letters of Administration of said estate issued to Flora H. Scarborough were introduced in evidence and marked Plaintiff's Exhibit No. 1.)

For two years prior to the war, my son had been working for R. A. Scarborough, another son, on the farm in New York State, about forty miles out from Buffalo. I saw my son frequently during those two years; he came home nearly every week end. He was 5 feet 3 and weighed about 120 pounds immediately before he went into the service and the general condition of his health was very good. I did not see him during the time he was in service at all. I saw him when he returned from the service on April 4, 1919. He stayed with me most of the time until I came West, about a month later."

And (R. 22):

"When I first saw him when he returned from the army he was completely changed, his color was poor he was very sallow and his general disposition was so changed that we all noticed it, not only the family, but all our friends. Before he went he was very deliberate, and very good natured but when he came back, he was easily disturbed, he was not anything like he was before and he would sit down for some time and not say a word, and would not answer any questions you would ask him, and he was very erratic and very nervous and had no appetite and did not sleep

well at all. He used to complain of headaches quite a bit after he came back and when we talked to him about working he said he didn't feel like working. During the month that he was with me he didn't do anything. He was supposed to be staying with me and he would start out in the morning and go down town and at night I would get a telephone message from down on the farm that he was there, and sometimes he would go out in the field to work and they would not know where he was, and I would telephone down at night that he had come back to Buffalo. We could not depend on him."

R. A. Scarborough testified by deposition as follows (R. 25-26):

"I am a brother of Floris Scarborough, the deceased insured. I saw him practically every day during the year previous to his entering the United States Army on September 25, 1917. He was living with me in Johnson Creek, New York, at the time he entered the army in 1917. He was a farmer and worked for me on the farm. I saw him on or about September 25, 1917 when he entered the army, and as I observed it, his health was good at that time. I have never known him to have any trouble with his health previous to entering the service and he lived with me from 1913 until he entered the service. I saw him immediately after his discharge from the army at Middleport New York, as soon as he arrived home from Long Island. As I observed it, the condition of his health at that time, was poor. He wasn't able to do anything. He looked all right, a little pale perhaps. He complained of weakness. When he

came home he said he was going to try to farm and was going at it strong, but he couldn't do anything. Sometimes he would do the chores. Some days he would work a half day and some days only two or three hours. He couldn't go to work and stick to it. He couldn't do any work.

As to his condition in April, 1919, compared to what it was in October or November of 1919, that is a hard question for an ordinary person to answer. He was thinner in October and November. He couldn't work. There was no improvement in his health during that time. As far as I observed, it was the other way if anything. To my knowledge he did no work after his discharge from the army. He did not work steadily, a half day at a time, quarter of a day, some days not at all. He made his home with me,—all three of us boys. I can't remember if he worked for anyone else besides us boys or not. I can't recall any instance: of course that is ten or twelve years ago. He was sick. He was not able to work. He complained of being weak, first in his leg and then in his arm; sometimes one leg, sometimes the other; sometimes one arm, sometimes the other. When he entered the army he was able to go out and do anything, was stronger and able to do anything, and when he came out of the army he was not able to do anything. He had a scar on his leg right by his ankle."

And on cross-examination the witness testified (R. 27-28) as follows:

"Prior to September 25, 1917, I saw him every day he worked on my farm. Every day he was under my surveillance. The farm consisted of

100 acres. To the best of my knowledge and belief he was out working on the farm. At times he was at one end of the farm and I was at the other end. He came to Middleport New York as soon as he got out of the army, within a day or two. I said he looked a little pale. I didn't notice any difference in his weight, probably a variance of a few pounds. I noticed no difference in his stature or his walk. He started work around the farm right away. I agreed to pay him a salary but never did. He never got started to work. He would work on the farm for a few hours, do the chores and after a while I would find him resting. He stayed with me quite a few days and one day he said, 'Well I can't do much around here, guess I will go see Mother.' Mother was in Buffalo at that time. While he was with me he worked a few hours a day. He stayed with me for several months and then returned to our mother. After that he went to Lee and Marshall our brothers. There was a period of time when he was away from my place but it would be hard to say how long, as I would see him every little while. I say he could not do much work because he was weak. During the first few months after he returned from the army, he did not see a doctor to my knowledge. The first time he consulted a doctor to my knowledge was the 16th day of December. I know he injured his thumb. The thumb of one hand. I don't remember which one. The night I took him to the doctor the hand was not cut, there were no bruises but practically the whole hand was swollen some."

Dr. Murray F. Mudge, the Scarborough family physician testified by deposition as follows (R. 30-31):

"I knew Floris Scarborough ever since he was four or five years old. I have been their family physician at Middleport, New York. His health prior to entering the service, was good, so far as I know. I never treated him for any serious condition. I saw him frequently unprofessionally. After his discharge from the army he came to my office on December 18, 1919 for consultation. The only thing I can remember treating him for previously, was for poison ivy and that was probably in 1914 or 1915. He came to see me December 18, 1919 about his hand and remained under my care until March 11, 1920. I made a diagnosis of injury to the thumb swollen and *general run down condition.* The last time I rendered any treatment to him was March 11, 1920. I did not treat him at his death. *I believe there was a connection between the septicemia which caused his death, and previous disabilities. I did not see him from the date of his discharge until December, and it would be impossible for me to state his condition at the time of his discharge from the army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March) I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime."* (Italics ours.)

And on cross-examination, this witness testified (R. 32):

"I decided that Floris Scarborough was permanently and totally disabled within the first month

after treatment. It was a question of how long he was going to live." (Italics ours.)

Charles Scarborough a witness for plaintiff, testified by deposition as follows (R. 33-34):

"After his discharge from the army on April 4, 1919 I first saw him about two weeks later at Buffalo, New York. His health as I observed at that time, was poor. He was thinner than I had seen him last. He gave me the impression, as so many soldiers that I have seen, that he had been shell shocked, he was irritable erratic: he seemed to jump from one thing to another. The only thing he ever complained of to me was that he could not sleep at night. He said he had dreams. I did not pay so much attention to that because I thought it was a reaction from war experience. He was very funny, for instance he would mention to me, 'let's go down to the corner and get a dish of ice cream' and get half way down and before we got down there, he would suggest something else and start up the other way, and he acted funny, is the only way I can describe it.

To my knowledge he had always been healthy and strong, always sort of an easy-going, deliberate sort of a fellow and when I saw him he was jumpy, erratic, nervous and got mad awfully easy. Naturally I thought there was something wrong with him."

Dr. Samuel E. Welfield, a witness for plaintiff testified in court, as follows (R. 35-36):

"I am quite familiar with the disease of septicemia in its various complications. Septicemia means a general infection of the system, having

its entry through the blood stream, primarily some source of infection, such as having a wound in any part of the body. It is usually caused by a germ which is a virulent pus-producing germ and usually found in infected wounds: these germs may get into the blood stream and produce septicemia in either active or latent form. Septus merely has reference to the condition of the infection,—a person having septicemia has a septus, a person having an infected wound we would say that he was in a condition of septus. In the latent condition of septus it may go on for years, it may go on for three or four or five years even, and then have an acute effect on some organ such as the heart or some other organ in the body, and there set up an acute infected process. There are degrees of septus condition. The most common physical effect of septicemia would be the feeling of weakness, loss in weight, decrease in the red blood cells, increase in the whites, and a general feeling of not being well or that something is wrong.

"It is possible for a person to have septicemia caused by some point of infection, such as an injury and have that condition continue in the body, although the point where it originally was is healed: it does not happen very frequently, but it does happen. It might be possible that a person in October 1918 received an injury to his leg in a form of two wounds from shrapnel and that in April of the following year he had some of the symptoms of septicemia as loss of weight and general run down condition and at the time the wound, as far as external appearance is concerned, is completely healed, and that the condition of septicemia might be traceable to the orig-

inal injury. In other words a person might have septicemia after the wound that caused it is healed. If a person had a condition of septus or septicemia either an illness of some kind or another injury would be likely to bring that to a head. If a person has an injury to a thumb and within a month the thumb starts to swell and the hand swells and it becomes progressively worse, there is no limit to the time for the condition of septicemia to exist. It might run on for several years, even after it had showed itself externally. If a person is found to have a slightly pale color and a general weakness, irritability and nervousness, a slight loss of weight, a slight stooping condition, apparent inability to exert himself, if he suffers from bad dreams, poor appetite and inability to sleep, these are symptoms of a septic condition. These symptoms would be enough in itself to diagnose it a condition of septus, provided there was no external evidence of any other disease."

And on cross-examination, this witness further testified as follows (R. 36-37):

> "In answer to the hypothetical question, I said it was possible in the case given to me, that septicemia might be traceable to the original wound received some years before" and "considering the symptoms that were mentioned in the hypothetical case, it would be possible to trace such septicemia back to the original injury in the leg."

On redirect examination this witness further testified (R. 38-39):

"Hematona is a blood clot from breaking a blood vessel and if we pick the skin the blood is underneath the skin and then instead of being absorbed as it usually is, the usual case is for the thing to become infected and we have to operate on it. If a person is in a healthy condition, in the usual case, it would be absorbed. Septus is the condition of the body: septicemia is the disease. If a person had septicemia and had this blood blister, the possibility of absorption would be that much less: if a person had a healthy normal blood, the probabilities are that it would be absorbed.

"As to the cure for septicemia, it is a very difficult thing. First of all you have to try to get at the primary cause. If there is an acute infected process, the idea is to clear that up and abate the infection of the blood stream, placing the patient under a condition of rest, very careful diet, and treating him the same as you would a T. B. case or any other case of infection."

On recross examination this witness further testified as follows (R. 39):

"In my experience in handling these cases of septicemia, I would say within my ten years' experience I have probably had half a dozen cases where the septicemia was caused by a new injury aggravated by an old well-healed wound or injury caused at least one year prior to the later wound which caused infection. The total number of cases treated by me during that time, conservatively, is 2,000 and the average where septicemia was so caused would be about six out of two thousand."

ARGUMENT.

THE RULE.

In all the multifarious decisions on the subject, nowhere do we recall the rule more clearly stated than in the language employed by Mr. Justice Sawtelle of this court, in *United States v. Burke,* 50 Fed. (2d) 635, where on page 655 he states:

> "At the end of the entire testimony, the defendant made a motion for a directed verdict in its favor on the ground that the evidence was not sufficient to establish a prima facie case. The question is whether the evidence tending to establish total and permanent disability while the policy was in effect, was sufficient to take the case to the jury. We do not weigh the evidence but inquire merely whether there was sufficient evidence to sustain the verdict and judgment."

And on page 656, Judge Sawtelle further says:

> "Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:
>
> > 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ

of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

'And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. Travelers' Ins. Co. v. Randolph, 78 F. 754, 24 C. C. A. 305; Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 F. 463, 20 C. C. A. 596; Rochford v. Pennsylvania Co., 174 F. 81, 98 C. C. A. 105; United States Fidelity & Guaranty Co. v. Blum (C. C. A.) 270 F. 946; Smith Booth-Usher Co. v. Detroit Copper Mining Co., 220 F. 600, 136 C. C. A. 58. In the case last cited this court said:

'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto'. United States Fidelity & Guaranty Co. v. Blake (C. C. A.) 285 F. 449, 452.'

"Again 'such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' Marathon Lumber Co. v. Dennis, 296 F. 471 (C. C. A. 5).

See also the following recent decisions of this court: U. S. v. Barker (C. C. A.), 36 F. (2d) 556; U. S. v. Meserve (C. C. A.), 44 F. (2d) 549; U. S. v. Rice (C. C. A.) 47 F. (2d) 749; U. S. v. Stamey (C. C. A.) 48 F. (2d) 150; U. S. v. Lawson (C. C. A.), 50 F. (2d) 646."

And again in *Sorvik v. U. S.,* 52 Fed. (2d) 406, this court per Sawtelle, C. J., said:

"The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge: it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.' United States Fidelity & Guaranty Co. v. Blake (C. C. A. 9), 285 F. 449, 452, and cases there cited: and United States v. Burke, 50 F. (2d) 653, decided by this court June 1, 1931 and cases there cited.

"And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 et seq.) which the courts have repeatedly held should be liberally construed in favor of the veterans. United States v. Eliasson (C. C. A. 9), 20 F. (2d) 821, 824; United States v. Sligh (C. C.

A. 9) 735, 736, certiorari denied, 280 U. S. 559, 50 Ct. 18, 74 L. Ed. 614; United States v. Phillips (C. C. A. 8), 44 F. (2d) 689, 692; Glazow v. United States (C. C. A. 2), 50 F. (2d) 178."

See, also.

Corsicana National Bank v. Johnson, 251 U. S. 68; 40 S. Ct. Rep. 82; 64 L. Ed. 141;
Hayden v. U. S., 41 Fed. (2d) 614, (C. C. A. 9);
Mulivrana v. U. S., 41 Fed. (2d) 734, (C. C. A. 9);
U. S. v. Rasar, 45 Fed. (2d) 545, (C. C. A. 9);
Vance v. U. S., 43 Fed. (2d) 975, (C. C. A. 7);
Malavski v. U. S., 43 Fed. (2d) 974, (C. C. A. 7);
U. S. v. Godfrey, 47 Fed. (2d) 126, (C. C. A. 1);
Ford v. U. S., 44 Fed. (2d) 754, (C. C. A. 1);
Carter v. U. S., 49 Fed. (2d) 221, (C. C. A. 4);
Kelley v. U. S., 49 Fed. (2d) 897, (C. C. A. 1);
U. S. v. Tyrakowski, 50 Fed. (2d) 766, (C. C. A. 7).

The closest case we have been able to find bearing on the particular facts of the case before us, is that recently decided by the 10th Circuit, in *U. S. v. Gower,* 50 Fed. (2d) 370. On account of its close similarity, we quote the court's opinion in full:

"Lewis, Circuit Judge.

Claude Gower, a soldier in the World War, was discharged from service on June 3, 1919, and immediately returned to his father's home in Ok-

lahoma. He sought employment of different kinds, but after short service in each, he in turn quit because he could not continue on account of his physical and mental condition. Early in November, 1919, he was accidentally and fatally shot. While in the military service two policies of term insurance of $5000.00 each, were issued to him on which premiums were paid to July 31, 1919.

His father and mother, appellees here, brought this suit on the policies as beneficiaries and recovered. They alleged that their son suffered total permanent disability during the life of the policies. The defendant below has appealed and contends that the verdicts are not sustained by the proof, hence the court erred in overruling defendant's motion for an instructed verdict in its favor; that the case should not have been submitted to the jury. That is the only error assigned, and the argument here is that the evidence does not sustain a finding that the insured suffered total permanent disability while the policies were in force.

On that subject Doctor King, who had practised medicine for twenty-five years, and had served as physician in the Medical Corps of the United States Army, was called as a witness. He saw and treated the insured twice a week for three or four weeks after his return home from military service. He testified that the physical and mental condition of Gower, was very poor. He had a rapid heart, listless expression, undernourished condition, both lungs abnormal, and more or less adema of the hands and face; that

from the history of the case he determined that the patient was suffering from gas poison, and that in his opinion he was not able to perform any substantial and gainful work; that while he was attending him he did not improve to amount to anything. He would have spells like asthma. When asked as to whether Gower might have recovered, had he not been accidentally shot, witness said he had a chance to get well. Asked whether or not his condition was permanent, he answered 'No, sir'; and asked whether he was able to say his condition was temporary he answered 'No, sir.'

Members of insured's family and others for whom he tried to work, described his condition, action and inability to continue except for very brief periods at different kinds of labor. A grocer who employed him to deliver groceries in the town testified that when he would direct him to go to one part of town, he would go to another part, and he would have to go, or send someone after him; that his mind seemed to wander; he kept trying to get him to work for some eight or ten days; that he was flighty and trembly, would give out and sit down. He tried other employment. He shucked corn for a day or so, and quit because he was sick. His appetite was poor and he didn't sleep much. He tried to work in the cane at another place, but quit in a short time and was sick in bed there for about three days. He tried to pick cotton, but became short of breath and had to quit. There was testimony that he fell from a horse for no apparent cause. Another witness testified he did not seem the same boy after he came

back, that he was before, that he could not hold down a job. Another neighbor testified that he was just silly, foolish. His father testified that he worked for about a week with him after he came home, and had to quit. His mother testified that he complained of headaches, and of the back of his head and of his breast; and after he worked a little he was unstrung and nervous. That he was wakeful, didn't rest at night, mumbled and groaned in his sleep, and had poor appetite. At times his hands would be swollen.

Other neighbors who saw and talked with Gower after his return, testified they did not notice any change in him, either mentally or physically. We do not doubt there was ample proof to sustain a finding that insured was totally disabled to engage in any gainful occupation on his return home, and that that disability continued while the policies were in force. A contrary conclusion in our judgment, would be against the greater weight of the evidence.

The real question here is whether the total disability thus proven and evidently found to exist, while the policies were still in force, was of such character and of such grip upon insured's vitality as to cause it to be reasonably certain that it would be permanent, thus disabling insured to follow continuously any substantially gainful occupation during the remainder of his natural life.

Doctor King, the only witness called who was competent as an expert to give an opinion on the subject of the extent of the soldier's disability, was not asked if that disability was total and permanent. He was asked whether the condition under

which he found the soldier was a permanent condition, and he answered, No. His condition might have been fluctuating,—better and then worse and vice versa,—but still in the doctor's opinion one of permanent and total disability to ever follow continuously, any substantially gainful occupation. In fact, he said the soldier's condition was not temporary, and had previously said he was not able to perform any substantial and gainful work. He also testified the soldier had a chance to get well,—a possibility, not a probability. So, it cannot be fairly said the verdicts were opposed to the judgment and opinion of the only witness competent to speak on this vital subject. Moreover, expert testimony is only an aid to the solution of the main issue. It cannot be arbitrarily ignored or indolently accepted, and after it has been considered by the jury, if they believe their own experience, observations and common knowledge, as applied to the facts in the case, will guide them to a solution and verdict, they have a right to follow their own convictions, thus reached, although in doing so, their verdict may be contrary to the opinion evidence of experts on the subject. United States Smelting Co. v. Parry, (C. C. A.) 166 F. 407, 411; Head v. Hargrave, 105 U. S. 45, 47-49, 26 L. Ed. 1028; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; Jones on Evidence, (2d. Ed.) 1373. After consideration of the evidence in the record, both that of laymen and the attending physician, as to the soldier's ailments and their effects upon him physically and mentally, we cannot hold that the proof does not sustain the verdicts.

Judgments affirmed."

ANSWER TO APPELLANT'S BRIEF.

We think opposing counsel's brief sounds more like a jury argument, than a brief in an appellate court,—that he attempts to argue a conflict of the evidence rather than a fair résumé of and a discussion of the sufficiency of the evidence,—the only question before this court.

We think counsel for appellant is mistaken in his conclusions when he states that Dr. Mudge, plaintiff's witness testified that the deceased soldier was not permanently and totally disabled when he first saw him in December of 1919. The exact language of Dr. Mudge's testimony is as follows (R. 30-31):

> "I did not treat him at his death. I believe there was a connection between the septicemia, which caused his death, and previous disabilities. I did not see him from the date of his discharge until December and it would be impossible for me to state his condition at the time of his discharge from the Army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March), I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime."

And, again, on cross-examination (R. 32):

> "I decided that Floris Scarborough was permanently and totally disabled within the first

> month after treatment. It was a question of how long he was going to live."

Thus, we submit that what Dr. Mudge testified to, in this respect, is simply that when he saw Scarborough the deceased soldier, the first time on December 18, 1919, he could not say from that one examination and treatment alone, that he was permanently and totally disabled, but after he had continued to treat him for a few weeks, the picture became perfectly clear and it was then all too plain to him that the deceased was permanently and totally disabled. We think the inference to be drawn, is not that he didn't believe Scarborough was permanently and totally disabled, but simply that he didn't think so the very first time he saw him on December 18, 1919,—in other words that the doctor's testimony relates not to the date the soldier's permanent and total disability began, but merely to the time the doctor made up his mind to this effect. In our opinion one of the best statements on this subject ever rendered by a court, is that appearing in the court's opinion in *Shoemake v. United States,* U. S. District Court, Eastern District of Kentucky, decided Nov. 19, 1931, wherein the court held:

> "*Held,* that in this court's judgment one who is afflicted with pulmonary tuberculosis, even though it may be incipient, is then totally disabled. He should engage in no occupation or do any work. His whole time should be taken up with efforts to check the advance of the disease. Though totally disabled he may not then be permanently disabled. Had he brought this suit immediately after his

> discharge he might have had trouble making out that such was the case. But subsequent events showed that the disability was permanent. And this court knows of no reason why one may not argue from effects to causes. He would have been justified in delaying the bringing of suit until he ascertained whether his disability was permanent. Judgment for Plaintiff."
>
> *Shoemake v. United States,* U. S. Dist. Court, Eastern Dist. of Ky. Decided November 19, 1931.

Sight must not be lost of the rule which requires not only that every reasonable inference to be drawn from appellee's evidence must be indulged in her favor, but that the policy itself must be liberally construed in favor of the insured.

Counsel in his brief, quotes quite extensively from the deposition of the Government witness, Dr. Philbrick. The lower court was not necessarily bound by Dr. Philbrick's evidence for two reasons: first, Dr. Philbrick being a witness for the defendant, neither plaintiff, nor the trial court was bound by his evidence, and second: Dr. Philbrick only saw the deceased soldier for nine days prior to his death, during all of which time he was desperately and fatally ill, and therefore the doctor was not in a position to give evidence of any great weight, concerning Scarborough's physical condition at the time of his discharge from the Army, and it was not only the privilege but the duty of the lower court as the trier of fact, to give to his testimony only such weight as he considered

was due it. Evidently and properly so, he gave it very little,—at any rate such conflicting testimony presents no question for this court.

In considering the question of medical evidence and its non-conclusive effect, in a case where the plaintiff's own doctors testified he was not permanently and totally disabled, the Circuit Court of Appeals for the 10th Circuit in *Barksdale v. United States,* 46 Fed. (2d) 762, at page 764, in reversing a directed verdict and granting a new trial to the plaintiff, said:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair. What it is possible for one man to do, is utterly impossible for another to perform, though apparently both are in the same mental and physical condition."

CONCLUSION.

We submit that fairly construed, and drawing only justifiable inferences from it, the evidence shows:

1. That the deceased soldier's wounds received in battle in France became infected and caused a latent septicemia from which he was suffering at the time of his discharge from the Army, and which was in fact the actual cause of his death ten months later. This is shown by the uncontroverted evidence of the deceased soldier's physical and mental condition immediately

after his discharge; by the testimony of Dr. Welfield that these symptoms are clearly those of septicemia, and by the deposition of Dr. Mudge who stated that he found a septic condition several months after the deceased's discharge from the Army and believed that there was a connection between the original wounds received in battle and this septic condition. The failure of the Government to produce the army records —which of course it has in its possession—makes the proof of this more difficult, but we believe it places no strained construction upon the evidence to say that the above is a reasonable inference from facts actually proved.

2. That when Scarborough, the deceased soldier returned from the war on April 4, 1919, he was a complete physical wreck and unable to work or earn his livelihood continuously, or otherwise, and that this condition of his health continued not only at the time his insurance lapsed at midnight on May 31, 1919, but at all times up to the time of his death on March 20, 1920.

3. That the injury to his thumb in the fall of 1919 (which didn't even break the skin, or cause an open wound) was merely a link in the chain of circumstances which caused his death, and, that his death was primarily caused by the septicemia, the definite evidence and symptoms of which were manifest at the very time he returned from the Army, and at a time when his insurance was in full force and effect, and,

4. That there is not even a scintilla of evidence that the deceased soldier, at any time since his discharge

from the Army had the ability to continuously follow a gainful occupation, but that the evidence of the lay witnesses, conclusively establishes the very opposite, and,

5. That the deceased, before the war an affable, agreeable hard working boy from the farm, returned from the war, a physical wreck, and totally and completely unable to do any substantial work, and wholly and completely incapable of earning his livelihood, and,

6. That the policy was designed, and premiums collected from the soldier, to insure against this very contingency.

The rule concerning employability, is probably nowhere more clearly stated than in *U. S. v. Cox,* 24 Fed. (2d) 944, (C. C. A. 8) where at page 946, it is said:

> "Ability to continuously follow a substantial, gainful occupation, implies ability to compete with men of sound mind and average attainments, under the usual conditions of life."

It is respectfully submitted that the record here is conclusive that Scarborough, the deceased soldier, had no such ability, at any time between his discharge from the Army and his death, and that therefore the judgment should be affirmed.

Respectfully submitted,

FREDERIC C. BENNER,
ALVIN GERLACK,
Attorneys for Appellee.

Dated, San Francisco,
January 16, 1932.

No. 6480

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE G. MARTINEZ,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This appeal is taken from the order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus.

The proceeding arose in the Court below by filing and presenting in behalf of the appellant a petition for a writ of habeas corpus praying for his discharge from the custody of John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, the respondent in the Court below and the appellee herein.

FACTS OF THE CASE.

On August 10, 1929, George G. Martinez, a native and subject of Mexico, pleaded guilty in this Court

(No. 20,964-L) to two counts of an indictment, the first of which charged a violation of the Harrison Narcotic Act (26 U. S. C. A. 692, 705) and the second of which charged a violation of the Jones-Miller Act. (21 U. S. C. A. 174.) He received an aggregate sentence of one year and one day and a fine in the sum of one dollar. The records of this Court show that the fine was paid.

After the defendant had served approximately ten (10) months of his sentence, he was taken into custody by the immigration authorities for the purpose of deportation.

ARGUMENT.

Admittedly, the alien's conviction under the Harrison Narcotic Act does not furnish grounds for his deportation.

> *United States ex rel. Andreacchi v. Curran,* 38 Fed. (2d) 498.

However, the right to deport the alien is claimed under the Jones-Miller Act, which provides as follows:

> "Sec. 2. (c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than

> $5,000 and imprisoned for not more than ten years. (21 U. S. C. 174.)
>
> * * * * * * *
>
> (e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the act of February 5, 1917, entitled 'An act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. (21 U. S. C. 175.)"

We take it that it is admitted that, in order that deportation may follow, as a result of conviction of a violation of the Jones-Miller Act, supra, is necessary that a sentence of imprisonment be imposed and this must be so in view of the language of Sec. 2 (e), supra, as follows:

> "any alien who at any time after his entry is convicted * * * shall upon the termination of his *imprisonment* * * * be taken into custody and deported * * *."

In other words, if an alien, upon conviction of a violation of that act, should receive a sentence of a *fine* only, he could not be deported. The question, therefore, arises:

> "Did the alien receive a sentence of imprisonment as the result of his plea of guilty to a violation of the Jones-Miller Act?"

The sentence, which the alien received upon the two counts of the indictment, was in the aggregate and was as follows:

> "It is therefore ordered and adjudged that the said George G. Martinez of the indictment be imprisoned for the period of one year and one day in the United States penitentiary and pay a fine in the sum of One Dollar. Furthermore ordered that in default of the payment of the said fine that said defendant (George G. Martinez) be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law."

It is our contention that it is impossible, in construing an aggregate sentence, which involves both imprisonment and fine, to apportion the *term of imprisonment* to any particular count of the indictment.

U. S. v. Peeke, 153 Fed. 166, C. C. A. 3rd.

And, an aggregate sentence of imprisonment upon two or more counts of an indictment does not run to *each of the counts severally.*

Brinkman v. Morgan, Warden, 253 Fed. 553, C. C. A. 8th.

However, in any event, if an aggregate sentence of imprisonment and fine is apportionable at all, we contend that a reasonable presumption of judicial regularity will assign the term of imprisonment to the first count of the indictment, namely, violation of the Harrison Narcotic Act, and the sentence of fine to the second count, namely, violation of the Jones-Miller Act. In *Ex parte Poole,* 273 Fed. 623, at page 624, Judge Bourquin, in construing an aggregate sentence, such as we have before us, said:

"Habeas corpus sought for that, upon petitioner's plea of guilty to an information charging three violations of the National Prohibition Act (Act of Congress October 28, 1919, c. 85, 41 Stat. 305) viz.: (1) Manufacturing intoxicating liquor without a permit; (2) failing to keep a permanent record of such liquor; and (3) possession of property designed to manufacture liquor intended for use in violation of said act—a single sentence and judgment were imposed that he be imprisoned 75 days and fined $150, which fine has been paid.

* * * Upon error, and in view of the record, a reasonable presumption of judicial regularity will assign the imprisonment to the first count of the information, and the fine to the second and third counts, and thus each offense is visited with the penalty the act authorizes. * * *."

CONCLUSION.

We respectfully submit that it being impossible to conclude from the sentence imposed that the alien was sentenced to imprisonment for a violation of the Jones-Miller Act, we submit that he is not deportable.

It is respectfully asked that the order of the Court below be reversed with directions to issue the writ of habeas corpus and discharge the applicant.

Dated, San Francisco,
September 26, 1931.

Respectfully submitted,
HENRY J. MEADOWS, JR.,
Attorney for Appellant.

No. 6480

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE A. MARTINEZ,
Appellant,

v.

JOHN D. NAGLE, as Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

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Parker Printing Company, 545 Sansome Street, San Francisco

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For the Ninth Circuit

GEORGE A. MARTINEZ,
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v.

JOHN D. NAGLE, as Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On August 10, 1929, George G. Martinez, appellant herein, a native and subject of Mexico, pleaded guilty as charged, in the District Court of the Southern Division of the Northern District of California, to an indictment (No. 20964-L) in two counts. The first count charged a violation of the Harrison Narcotic Act (26 U. S. C. 692, 705). The second charged a violation of the Jones-Miller Act (21 U. S. C. 174).

The court passed judgment and sentence upon the appellant as follows:

> "It Is Therefore Ordered and Adjudged that the said George G. Martinez of the Indictment be imprisoned for the period of One (1) Year and One (1) Day in a United States Penitentiary, and pay a fine in the sum of one (1) dollar. Further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law." (Resp. Exhibit A, p. 9.)

He was ordered deported by the Secretary of Labor on the 16th day of April, 1930. The order of deportation recites that he is ordered deported under

> "The Act of February 9, 1909, as amended by the Act of May 26, 1922, in that he is an alien that has been convicted under Subdivision C, Section 2 thereof." (Resp. Exhibit A, page 25.)

Having been taken into custody by the Immigration Authorities, he petitioned the District Court for a writ of habeas corpus, which petition was denied.

It is from the order of the District Court denying the petition for the writ of habeas corpus, that this appeal is taken.

THE LAW.

Section 2 of the Act of February 9, 1909, as amended by the Act of May 26, 1922, referred to in the order of deportation mentioned above, provides as follows:

"Sec. 2. (c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000. *and* imprisoned for not more than ten years. (21 U. S. C. 174)."

"(e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the act of February 5, 1917, entitled 'An act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. (21 U. S. C. 175)."

The government does not contend that the alien would be liable to deportation because of the sentence for violation of the Harrison Narcotic Law alone, under the law as it existed at the time of such sentence.

United States ex rel. Andreacchi v. Curran, 38 Fed. (2d) 498.

The government does contend that appellant is liable to deportation because the sentence imposed was a

sentence for one year or more under the Jones-Miller Act.

The government concedes that the sentence under the Jones-Miller Act must be for at least one year before the alien is liable to deportation.

Chung Que Fong v. Nagle, (C. C. A. 9) 15 Fed. (2d) 789;

Weedin v. Moy Fat, (C. C. A. 9) 8 Fed. (2d) 488;

Charlie Gib v. Weedin, (C. C. A. 9) 8 Fed. (2d) 489; certiorari denied 271 U. S. 667;

U. S. ex rel., Grimaldi v. Ebey, (C. C. A. 7) 12 Fed. (2d) 922;

Hachiji Shibata v. Tillinghast, (D. C. Mass.) 31 Fed. (2d) 801.

THE ISSUE.

The sole issue presented to this court upon this appeal is to interpret the judgment of the District Court sentencing the appellant to a year and a day and $1.00.

The question is

Has appellant been sentenced to imprisonment for a year or more for violation of the Jones-Miller Act?

ARGUMENT.

An examination of appellant's opening brief discloses that the question as above stated is more favor-

able to him than as phrased by himself in his opening brief. (Appellant's Opening Brief, p. 3.)

The record shows that appellant pleaded guilty to the indictment. It is true the judgment does not show the sentence on particular counts, but merely shows a sentence of a year and one day and a fine of $1.00.

HOW IS THIS SENTENCE TO BE INTERPRETED?

The sentence of the District Court is susceptible of four possible interpretations.

(1) The sentence consists in a total or aggregate sentence of shorter jail terms and a total of smaller fines on each of the two counts.

This is apparently what appellant means when he uses the expression "aggregate sentence". This theory is not sustainable. The defendant could not have been sentenced to a penitentiary unless the sentence exceeded one year.

Mitchell v. United States, (C. C. A. 9) 196 Fed. 874, certiorari denied 266 U. S. 611.

Separate sentences of not more than one year each, but of more than one year in the aggregate, to be served in the penitentiary, would be void.

In re Mills, 135 U. S. 263, at 270.

(2) The sentence of a year and a day imprisonment runs to the first count and the fine of $1.00 to the second count.

This seems to be the interpretation contended for by the appellant. (Appellant's Opening Brief, pp. 4 and

5.) The Harrison Narcotic Act provides for the penalty in the *disjunctive.* "Imprisonment or fine or both." The Jones-Miller Act provides for the penalty in the *conjunctive* "Imprisonment *and* fine." If appellant were sentenced on the second count at all, he must have been sentenced to both fine *and* imprisonment. The presumption of judicial regularity referred to by appellant is opposed to any other interpretation.

(3) The appellant was sentenced on only one of two counts and it does not appear on which count he was sentenced.

The presumption of judicial regularity which appellant stresses at pages 4 and 5 in his opening brief, would prohibit this interpretation, which would necessitate holding that no sentence at all was imposed upon a count to which the defendant had pleaded guilty and which had not been dismissed.

Furthermore, as a complete answer to this contention, it is only necessary to point out that if this judgment were void as to either of these two counts, the sentence would stand in its entirety as to the other count.

Claassen v. United States, 142 U. S. 140.

The sentence therefore, must necessarily run to each count in the indictment.

(4) The sentence is a concurrent sentence of one year and one day and a fine of $1.00 on each of the two counts.

This is the interpretation for which appellee contends here.

> "Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments, or

on several counts of the same indictment, in the same court, each sentence begins to run at once and all run concurrently, in the absence of some definite specific provision that the sentences shall run consecutively, specifying the order of sequence."

Puccinelli v. United States, 5 Fed. (2d) 6 (C. C. A. 9);

United States v. Patterson, (C. C.) 29 F. (2d) 775;

Daugherty v. United States, (C. C. A.) 2 F. (2d) 691.

"And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

Claassen v. United States, 142 U. S. 140, at 146 and 147;

Locke v. United States, 7 Cranch 339-344;

Clifton v. United States, 4 How. 242, 250;

Snyder v. United States, 112 U. S. 216;

Bond v. Dustin, 112 U. S. 604, 609;

1 *Bishop Crim. Pro.,* Sec. 1015;

Wharton Criminal Pleading & Practice, Section 771.

It therefore, necessarily follows that this sentence must run to each count of the indictment because if either of the counts were void, the sentence would stand in its entirety as to the remaining count.

Appellee is satisfied that here is the answer to the question presented to this court.

The two authorities cited by appellant in his opening brief (Appellant's Opening Brief, pp. 4 and 5) are not in point and of no assistance to the court here.

United States v. Peake, 153 Fed. 166,

simply holds that

> "Where a defendant has been convicted on different counts of an indictment and the court imposes a single sentence on any count for a term longer than is authorized by the statute for one offense, the sentence is void to the extent of excess."

Brinkman v. Morgan, 253 Fed. 533,

simply holds:

> "Where a defendant pleads guilty to an indictment charging various offenses carrying maximum penalty of five years for each offense, the sentence of ten years to run concurrently on all counts is valid."

The case is helpful however, to this extent, that it defines the word "concurrently".

> "It is true that the word 'concurrently' is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate

that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as 'in combination or unity'. When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate."

Brinkman v. Morgan, 253 F. at 554.

It is significant that the District Court denied the petition for writ of habeas corpus. Is this not tantamount to an expression of the intention of that court as to what sentence was intended to be imposed by it?

"The prior history of this case—a first sentence, a decision in habeas corpus, and then the present sentence—indicates that the above was intended by the court in which the appellant was tried."

Brinkman v. Morgan, at 555, cited by appellant in his opening brief.

To hold what is contended for by appellant here would in effect be to permit a mere clerical error to defeat the intention of the District Court impliedly expressed in its denial of the petition for the writ of habeas corpus.

GEO. J. HATFIELD,
United States Attorney,

WILLIAM A. O'BRIEN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 6482

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. G. SHELLENBARGER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

CHARLES A. HART, FLETCHER ROCKWOOD, and CAREY, HART, SPENCER & McCULLOCH, Yeon Building, Portland, Oregon,

For the Appellant.

MALARKEY, DIBBLE & HERBRING, Yeon Building, Portland, Oregon, and FRANK G. SMITH, Porter Building, Portland, Oregon,

For the Appellee. [1*]

In the District Court of the United States for the District of Oregon.

July Term, 1930.

BE IT REMEMBERED, that on the 30th day of July, 1930, there was duly filed in the District Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Multnomah County, the complaint therein being in words and figures as follows, to wit: [2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon for the County of Multnomah.

W. G. SHELLENBARGER,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Corporation,

Defendants.

COMPLAINT.

Plaintiff for cause of action against defendants alleges:

I.

At all times hereinafter mentioned defendant, Great Northern Railway Company, was and still is a corporation, organized and existing under the laws of the State of Minnesota and defendant, Spokane, Portland and Seattle Railway Company, was and still is a corporation, organized and existing under the laws of the State of Washington.

II.

At all times hereinafter mentioned said defendants were and still are engaged in the operation of a transcontinental railway system extending from Portland, Oregon, to various points in the East and were and still are engaged, as common carriers for hire and profit, in the business of transporting passengers by means of steam railroad trains, owned and/or controlled and/or operated by them.

III.

On July 12, 1928, a special train was made up by said defendants or one of them at Portland, Oregon, for the purpose of transporting members of a lodge or organization known as the "Knights Templar" to Detroit, Michigan, in which latter city a [3] triennial conclave of said lodge order was later to be held. Said special train was commonly known as and called the "Knights Templar Special."

IV.

Plaintiff who was at said time and still is a resident of said City of Portland, Oregon, and who intended to and was on his way to attend said conclave, purchased on said July 12, 1928, at said Portland, Oregon, from the agent of defendants or of said defendant, Spokane, Portland and Seattle Railway Company, a railway ticket, entitling him to transportation on said special train from said Portland, Oregon, to said Detroit, Michigan, and on the morning of said July 12, 1928, plaintiff boarded said special train at said Portland, Oregon and became and was a passenger thereon and entitled, as such, to be safely carried and transported to his said place of destination.

V.

Said special train proceeded to and arrived at Spokane, Washington, without incident. Upon the arrival of said special train at said Spokane and from there on eastward, for the balance of said contemplated journey, plaintiff has been informed and believes, and, therefore, alleges the fact to be

that said special train became and was a Great Northern Railway Company train and was controlled and operated from said Spokane on and up to and including the place where plaintiff was injured, as hereinafter alleged, by the said defendant, Great Northern Railway Company. Whether plaintiff's information with relation to which of said defendants was operating and responsible for the movements of said special train at the time and place of his said injury is correct or not plaintiff has no means at this time, of knowing, the said matter being peculiarly within the knowledge of defendants and, therefore, in the subsequent allegations of this complaint, with respect to the negligence, which the plaintiff claims occasioned [4] and caused his injuries, plaintiff charges such negligence against both and/or either one of said defendants.

VI.

On the evening of July 13, 1928, at about the hour of 10:30 P. M., while plaintiff was riding, as aforesaid, as a passenger on said special train and at a time when said train was entering upon or taking a siding, at or near the Town of Saco, in the State of Montana, and while plaintiff was in the act of walking forward on said train, in a careful and prudent manner, from the observation car of said train to a car ahead in which his berth was located, the plaintiff was, by reason of the carelessness and recklessness and negligence of the said defendants and/or one or both of them, acting by and through the agents and employees in charge of and operating said train, thrown and

hurled therefrom with great force and violence to the railway right of way and then and there and by reason of said carelessness and recklessness and negligence suffered and sustained the injuries hereinafter set forth.

VII.

The said throwing and hurling of plaintiff from said train resulted from and was solely occasioned and proximately caused by the carelessness and recklessness and negligence of said defendants and/or one or both of them, acting through said agents and employees in charge of said train, and in failing to exercise the high degree of care owing from a common carrier to its passengers, in the following particulars, to wit:

(1) Said train was carelessly and recklessly and negligently operated at a high and dangerous and excessive rate of speed in view of the fact that it was at the time of said occurrence approaching and about to enter upon and about to take a siding, and that in slowing down said train for the purpose of later entering said siding said train was so carelessly and negligently operated that it was thereby caused to sway and to [5] give an unusual and extraordinary and unnecessary and unduly violent lurch, thereby causing plaintiff to lose his balance and fall.

2. Said train was carelessly and recklessly and negligently suffered and permitted to be in an unsafe condition and dangerous to passengers, who might be in the act of passing from one car to another, in that the vestibule door and the steps on the car from which plaintiff was so thrown were al-

lowed to be and remain open and to be unguarded and unprotected and insufficiently and not properly lighted and in that said vestibule door and steps were open and allowed to be and remain open and exposed between stations at a time when said train was still in rapid motion and at an improper and unsafe place in said train and in that there was a failure and neglect to warn or notify plaintiff in any manner of the said open vestibule door and steps and of the danger of injury that might result therefrom.

VIII.

By reason of the said carelessness and recklessness and negligence plaintiff was thrown and hurled with great force and violence and thereby and in consequence thereof suffered and sustained a fracture of his skull and injuries to his brain and nervous system; his right shoulder-bone was chipped at the socket and he received a severe contusion at the base of the skull and his neck and the ligaments and muscles and tendons thereof were badly wrenched and injured and he then and there suffered a severe shock and was rendered sick and lame and sore and was bruised and lacerated in various parts of his body and person. By reason of the injuries so negligently inflicted upon him plaintiff's hearing has been impaired and he has ever since receiving the same suffered and still suffers from a dull pain over the region of the back of his head and by reason of the said brain injuries received by plaintiff and of the injuries to his nervous system plaintiff has been left in a morose and melancholy and nervous condition and suffers from lapses

[6] of memory and is unable to concentrate or remember and his ability to speak or to enunciate or articulate distinctly has been impaired and injured and his ability to walk has been affected, thereby causing him to walk with a shuffling and unsteady gait. Plaintiff was, prior to receiving said injuries, strong and vigorous and enjoying good health. By reason of all of the injuries so suffered and sustained by plaintiff his health and nervous system have been permanently injured and impaired and he has ever since receiving said injuries suffered and will continue to suffer great pain and mental anguish and he has by reason of the injuries so negligently inflicted upon him been permanently injured and damaged in the full sum of Fifty Thousand ($50,000.00) Dollars.

IX.

By reason of the said injuries so negligently inflicted upon him plaintiff was necessarily confined in a hospital at Glasgow, Montana, undergoing medical and surgical care for a period of two weeks and later at the Good Samaritan Hospital in Portland, Oregon, for a period of about a month and half, and plaintiff has expended on account of hospital and nursing services the sum of Seven Hundred ($700.00) Dollars. Plaintiff has been required to engage the services of physicians in an attempt to relieve his said injuries and is still consulting a doctor and receiving medical attention, and plaintiff has so far necessarily expended or become liable for, by way of doctor expense, the sum of Seven Hundred and Fifty ($750.00) Dollars, and

has further expended the sum of Thirty ($30.00) Dollars for examination of his eyes and for new glasses to replace those broken, and has lost in wages and earnings which he would otherwise have received the sum of Two Thousand ($2,000.00) Dollars. The sums so expended or for which plaintiff is liable were and are the usual and customary charges for services of like kind and character and by reason of the facts set forth in this paragraph plaintiff has been [7] and is specially damaged in the further sum of Thirty-four Hundred and Eighty ($3480.00) Dollars.

WHEREFORE, plaintiff prays for judgment against said defendants and each of them in the sum of Fifty-three Thousand and Four Hundred and Eighty ($53,480.00) Dollars, and for his costs and disbursements herein incurred.

MALARKEY, DIBBLE & HERBRING, and
FRANK G. SMITH,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, W. G. Shellenbarger, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause; and that I believe the foregoing complaint to be true.

W. G. SHELLENBARGER.

Subscribed and sworn to before me this 11th day of July, 1930.

[Seal] A. M. DIBBLE,
Notary Public for the State of Oregon.
My commission expires on July 1, 1932.

[Endorsed]: Filed July 11, 1930. A. A. Bailey, Clerk. H. E. Graham, Deputy.

Transcript of record filed in United States District Court, July 30, 1930. G. H. Marsh, Clerk. By F. L. Buck, Chief Deputy. [8]

AND AFTERWARDS to wit, on the 30th day of July, 1920, there was duly filed in said court an answer of defendant Great Northern Railway Company, in words and figures as follows, to wit: [9]

[Title of Court and Cause.]

ANSWER OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY.

Defendant, Great Northern Railway Company, for answer to the complaint in the above-entitled case alleges:

I.

Admits the allegations of Paragraph I of the complaint.

II.

Answering Paragraph II of the complaint this defendant alleges that defendant, Spokane, Portland and Seattle Railway Company, operates a railway system extending from Portland, Oregon, to Spokane, Washington, and that defendant, Great Northern Railway Company, operates a line of railway extending from a connection with the railroad of defendant, Spokane, Portland and Seattle Rail-

way Company, at Spokane, Washington, to points in the State of Montana and east thereof in the states of North Dakota and Minnesota, and this defendant admits that both defendants are common carriers as alleged in the said Paragraph II.

III.

Admits the allegations of Paragraph III of the complaint. [10]

IV.

Admits the allegations of Paragraph IV of the complaint down to and including the word "thereon" in line 14 of page 2 of the complaint, but except as so admitted defendant denies the allegations of Paragraph IV of the complaint.

V.

Admits that after said train reached Spokane, Washington, and thereafter until said train had reached a point beyond the point where the alleged injuries to the plaintiff are alleged to have occurred, said special train was controlled and operated by this defendant as alleged in Paragraph V of the complaint.

VI.

Admits that on the evening of July 13, 1928, at or about the hour of 10:30 P. M., the plaintiff fell from said train to the defendant's right of way and that as a result of said fall plaintiff sustained certain injuries, as alleged in Paragraph VI of the complaint, but except as so specifically admitted defendant denies the allegations of said Paragraph VI.

VII.

Denies the allegations of Paragraph VII of the complaint.

VIII.

Admits that as a result of said fall plaintiff sustained certain personal injuries, the extent of which are to this defendant unknown, but except as so admitted defendant denies the allegations of Paragraph VIII of the complaint.

IX.

Admits that as a result of said injuries plaintiff was confined in a hospital at Glasgow, Montana, for a certain [11] period and there received medical and surgical care and that later plaintiff was confined at Good Samaritan Hospital in Portland, Oregon, for a certain period as alleged in Paragraph IX of the complaint. Defendant has no information sufficient to form a belief as to other facts alleged in said Paragraph IX and for that reason denies all of the other allegations contained in said Paragraph IX.

Further answering and as a separate defense defendant alleges that the fall from the said train and the injuries therefrom resulting to the plaintiff were caused solely by the contributory negligence of the plaintiff in that just prior to the time of said injuries an employee of this defendant in the regular discharge of his duties in connection with the operation of said train and in the exercise of due care for the safety of said train and the passengers thereon, had opened a certain vestibule door on one of the cars of said train, and said employee

was standing at said open door for the purpose of observing the movement of said train and assisting in the operation thereof, and that while said employee was standing in the opening at said door, without any warning to him and without any knowledge on the part of said employee of the intentions of the plaintiff, the plaintiff proceeded from the vestibule and fell to the ground and sustained certain personal injuries as a result of said fall. That said acts of the plaintiff were negligent and done without due care for his own safety and were the sole cause of said injuries.

WHEREFORE, this defendant demands that plaintiff take nothing by this action and that this action be dismissed [12] and that defendant have its costs and disbursements herein.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant Great Northern Railway Company.

State of Oregon,
County of Multnomah,—ss.

I, Fletcher Rockwood, being first duly sworn, depose and say that I am of attorneys for defendant, Great Northern Railway Company, in the above-entitled action; that I have read the foregoing answer, know the contents thereof, and that the same is true as I verily believe.

I further certify that this verification is made by me as attorney for defendant, Great Northern Rail-

way Company, for the reason that none of its officers are within the District of Oregon.

FLETCHER ROCKWOOD.

Subscribed and sworn to before me this 30th day of July, 1930.

[Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires Aug. 28, 1931.

Filed July 30, 1930. [13]

AND AFTERWARDS, to wit, on the 7th day of August, 1930, there was duly filed in said court a reply, in words and figures as follows, to wit: [14]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT GREAT NORTHERN RAILWAY COMPANY.

Comes now the plaintiff and for his reply to the answer of defendant, Great Northern Railway Company, admits the affirmative allegations contained in paragraphs numbered II and V thereof.

Replying to the further and separate answer and defense of said defendant, plaintiff denies each and every allegation therein contained, and the whole thereof, except that plaintiff admits that he fell to the ground and sustained certain personal injuries as a result thereof.

WHEREFORE having fully replied to said answer, plaintiff demands judgment against said defendant, Great Northern Railway Company, for the sum of Fifty-three Thousand and Four Hundred and Eighty ($53,480.00) Dollars, and for his costs and disbursements herein incurred, as prayed for in plaintiff's complaint.

MALARKEY, DIBBLE & HERBRING and
FRANK G. SMITH,
Attorneys for Plaintiff. [15]

State of Oregon,
County of Multnomah,—ss.

I, W. G. Shellenbarger, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause, and that I believe the foregoing reply to be true.

W. G. SHELLENBARGER.

Subscribed and sworn to before me this 1st day of August, 1930.

[Seal] A. M. DIBBLE,
Notary Public for the State of Oregon.

My commission expires on July 1, 1932.

Filed August 7, 1930. [16]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of September, 1930, the same being the 68th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [17]

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 30, 1930 —ORDER OF VOLUNTARY NONSUIT AS TO DEFENDANT, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY.

Upon the oral motion of Malarkey, Dibble & Herbring, of counsel for plaintiff in the above-entitled action, for the entry of a judgment of voluntary nonsuit as to the defendant, Spokane, Portland and Seattle Railway Company, and it appearing to the Court from the record and files in this cause that no counterclaim has been pleaded by said defendant or any other appearance made by it and that said motion should be allowed,—

IT IS HEREBY ORDERED that a judgment of voluntary nonsuit be and the same is hereby entered against the said plaintiff and in favor of said defendant, Spokane, Portland and Seattle Railway Company without costs.

Dated September 30, 1930.

R. S. BEAN,
Judge.

Filed September 30, 1930. [18]

AND AFTERWARDS, to wit, on the 16th day of December, 1930, there was duly filed in said court, a verdict, in words and figures as follows, to wit: [19]

[Title of Court and Cause.]

VERDICT FOR PLAINTIFF.

We, the jury, duly impaneled and sworn to try the above-entitled action, find our verdict in favor of the plaintiff and against the defendant, Great Northern Railway Company, a corporation, and hereby fix and assess the damages to be recovered by plaintiff from said defendant at the sum of $18,480.00.

Dated December 15, 1930.

J. T. RORICK,
Foreman.

Filed December 16, 1930. [20]

AND AFTERWARDS, to wit, on Tuesday, the 16th day of December, 1930, the same being the 30th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [21]

[Title of Cause.]

MINUTES OF COURT—DECEMBER 16, 1930—JUDGMENT.

Now at this day comes the plaintiff by Mr. Arthur M. Dibble, of counsel, and the defendant by Mr. Fletcher Rockwood, of counsel. Whereupon the

jurors impaneled herein being present and answering to their names, the further trial of this cause is resumed. And thereafter said jury having heard the evidence adduced, the argument of counsel and the instructions of the court retires in charge of a proper sworn officer to consider of its verdict. And thereafter said jury comes into court and returns its verdict in words and figures as follows, to wit:

> "We, the jury, duly impaneled and sworn to try the above-entitled action, find our verdict in favor of the plaintiff and against the defendant, Great Northern Railway Company, a corporation, and hereby fix and assess the damages to be recovered by plaintiff from said defendant at the sum of $18,480.00.
>
> Dated December 15, 1930.
>
> J. T. RORICK,
> Foreman."

which verdict is received by the Court and ordered to be filed. Whereupon upon motion of plaintiff for judgment,

IT IS ADJUDGED that plaintiff do have and recover of and from said defendant, Great Northern Railway Company, a corporation, the sum of $18,480.00, together with his costs and disbursements herein taxed at $69.10, and that execution issue therefor. [22]

AND AFTERWARDS, to wit, on the 20th day of December, 1930, there was duly filed in said court a motion for new trial and in arrest of judgment, in words and figures as follows, to wit: [23]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

Defendant, Great Northern Railway Company, respectfully moves the court for a new trial in the above-entitled case and in arrest of judgment for the following causes:

1. The damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice.

2. The evidence at the trial was insufficient to justify the verdict.

3. Errors of law occurred at the trial and were excepted to by this defendant as follows:

(a) The court erred in refusing to grant defendant's motion for a directed verdict in its favor.

(b) The court erred in refusing to give defendant's requested instructions II, III, IV and IV–a reading respectively as follows:

"II.

There is no evidence from which you may find that the speed of the train was excessive and negligent. [24]

III.

I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

IV–a.

I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered."

(c) The court erred in overruling the objection of the defendant to question propounded to witness, Georgia H. Cheney, relating to the condition of the vestibule and steps of the car when the witness went to the vestibule after having been advised that the accident had happened as follows:

"Q. And what was the situation there with respect to the vestibule and steps.

Mr. ROCKWOOD.—I object to that, your Honor. It has not been shown that the condition at that moment was the same as when the accident happened.

COURT.—I think that is probably for the jury."

(d) The court erred in overruling the objection of the defendant to the question propounded to witness, Georgia H. Cheney, relating to an unusual occurrence in the operation of the train prior to the time that the witness went to the vestibule of the car and after the witness had been advised of the accident as follows: [25]

"Q. State whether or not anything unusual occurred with respect to the operation of the train immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

Mr. ROCKWOOD.—I object to that, if your Honor please. I hate to make these objections constantly, but I object to that on the ground that the time is not fixed as being coincident with the accident.

Mr. DIBBLE.—I think the time is pretty well fixed, because the witness has already testified that at the time she observed the door to be open, that the train was slowing down to make this stop at Saco, to take this siding, which is shown to be about half a mile.

COURT.—I think that is for the jury."

(e) The court erred in overruling the objection of the defendant to question propounded to witness, Mrs. J. L. Freck, relating to the condition of the vestibule when the witness went to the vestibule of the car after having been informed of the accident as follows:

"Q. Now when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion, and hadn't yet come to Saco, what condition did you find the vestibule of that coach in?

Mr. ROCKWOOD.—I object to that, your Honor, because there is nothing to show that the condition at that time was the same as the condition at the time of the accident.

COURT.—I think she can testify."

(f) The court erred in overruling the objection of the defendant to the question propounded to witness, J. O. Freck, relating to the condition of the vestibule when the witness went to the vestibule after having been informed of the accident as follows:

"Q. What was the condition of the vestibule there at the rear end of that coach?

Mr. ROCKWOOD.—I repeat the objection this is not competent; not shown the condition was the same at the time of the accident. [26]

COURT.—Have to get to that by a process of elimination I suppose; go ahead, you can answer."

The foregoing motion is made upon the pleadings and proceedings in the trial of the above-entitled case, including the minutes of the court, for the causes above specified each of which is a cause specified in Section 2–802 Oregon Code Annotated, 1930, being the same as Section 174 Oregon Laws, and in accordance with the rules of this court.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant, Great Northern Railway Company.

Filed December 20, 1930. [27]

AND AFTERWARDS, to wit, on Tuesday, the 24th day of February, 1931, the same being the 77th judicial day of the regular November term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [28]

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 24, 1931—ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard by the court upon the motion of the defendant Great Northern Railway Company, a corporation, for a new trial herein, and was argued by Mr. Arthur M. Dibble, of counsel for the

plaintiff, and by Mr. Fletcher Rockwood, of counsel for the said defendant. Upon consideration whereof,—

IT IS ORDERED that the said motion be and the same is hereby denied. [29]

AND AFTERWARDS, to wit, on Friday, the 13th day of March, 1931, the same being the 11th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [30]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 13, 1931—ORDER RE ATTACHING ORIGINAL EXHIBITS TO PROPOSED BILL OF EXCEPTIONS.

Upon application of the defendant, Great Northern Railway Company,—

IT IS HEREBY ORDERED that the original exhibits offered and received in evidence at the trial of the above-entitled case on behalf of the plaintiff and the defendant, being Plaintiff's Exhibits numbers 1 to 4, inclusive, and Defendant's Exhibits "A" to "J," inclusive, be withdrawn, and thereupon attached to, to form a part of proposed bill of exceptions filed and presented by the defendant on this date.

Dated March 13th, 1931.

JOHN H. McNARY,
Judge.

Filed March 13, 1931. [31]

AND AFTERWARDS, to wit, on the 3d day of April, 1931, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

This cause came on for hearing before the Honorable Robert S. Bean and a jury, on the 11th day of December, 1930; Messrs. A. M. Dibble and Frank G. Smith appearing as attorneys for the plaintiff, and Mr. Fletcher Rockwood appearing as attorney for the defendant.

There is annexed hereto and made a part hereof a complete stenographic report of the evidence, all objections, motions, and rulings thereon, and the whole thereof, together with the instructions of the Court to the jury and the exceptions, certified to by Mary E. Bell, Reporter of the United States District Court for the District of Oregon.

There are also annexed hereto and made a part hereof all of the exhibits offered and received in evidence upon the trial, being Plaintiff's Exhibits 1 to 4, inclusive, and Defendant's Exhibits "A" to "J," inclusive.

After hearing all of the evidence, the argument

of counsel and the charge of the Court, the jury retired to consider their verdict and thereafter returned a verdict in favor of the plaintiff, assessing his damages at $18,480, upon which [33] verdict judgment was thereafter and on the 16th day of December, 1929, entered by the Court against the defendant.

Thereafter and on the 20th day of December, 1930, the defendant served and filed its motion for a new trial and in arrest of judgment, upon the grounds that the verdict was excessive and the result of passion and prejudice, and that certain errors of law, as particularly specified in said motion, occurred at the trial.

The Honorable Robert S. Bean, the Judge who presided at the trial, died before he had ruled on and disposed of said motion, and thereafter and on the 16th day of February, 1931, said motion was argued orally before the Honorable John H. McNary, another of the Judges of this court. Thereafter and on the 24th day of February, 1931, the Honorable John H. McNary made the order of this court denying said motion for a new trial and in arrest of judgment.

During the trial of said cause, on direct examination of Mrs. Georgia H. Cheney, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows:

> "Q. And what was the situation there with respect to the vestibule and steps?"

Counsel for the defendant objected thereto, and the Court overruled the objection. To the overrul-

ing of the objection the defendant excepted and its exception was thereupon allowed.

During the trial of said cause, on direct examination of Mrs. J. L. Freck, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows: [34]

> "Q. Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?"

Counsel for the defendant objected thereto, and the court overruled the objection. To the overruling of the objection the defendant excepted and its exception was thereupon allowed.

During the trial of said cause, on direct examination of J. O. Freck, a witness called on behalf of the plaintiff, a question was propounded to said witness in words, as follows:

> "Q. What was the condition of the vestibule there at the rear end of the coach?"

Counsel for the defendant objected thereto, and the Court overruled the objection.

At the close of all of the testimony offered and received upon the trial, and before the argument of counsel and the submission of the case to the jury, defendant moved the Court for an order directing the jury to return a verdict in its favor, which said motion was as follows:

> "The defendant at this time moves the Court for a directed verdict in its favor on the ground

that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition of the vestibule, as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. And further that the evidence shows that plaintiff was guilty of contributory negligence and that such negligence was the proximate cause of the accident."

Thereupon the Court overruled said motion. To the order overruling its motion the defendant excepted and its exception was [35] thereupon duly allowed.

At the close of all of the evidence offered and received upon the trial, and before the argument of counsel to the jury, the defendant presented to the Court, in writing, certain requested instructions to be given to the jury, including, among others the following:

"II.

There is no evidence from which you may find that the speed of the train was excessive and negligent.

"III.

I charge you that there is no evidence presented in this case that there was a lurch of

the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

"IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

"IV–a.

I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered."

The Court refused to give said requested instructions numbered II, III, IV and IVa, or any one of them, to which refusal the defendant excepted and its exception was thereupon allowed.

Defendant tenders herein its bill of exceptions to the action of the Court at the trial, and the action in denying the defendant's motion for a new trial

and in [36] arrest of judgment, in each of the particulars set forth herein.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

Service of the foregoing bill of exceptions is hereby admitted this 13th day of March, 1931.

A. M. DIBBLE,
Attorney for Plaintiff. [37]

[Title of Court and Cause.]

PLAINTIFF'S OBJECTIONS AND AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the plaintiff and objects to the bill of exceptions proposed and served herein by the defendant on March 13, 1931, and respectfully moves the Court that said bill of exceptions be amended in the following particulars, to wit:

I.

That there be added after the word "before" in line 13, page 2, the following words "and briefs submitted to" and after the word "Court" in line 14, page 3, the following words "and by the latter taken under advisement."

II.

That there be added after the word "allowed," line 26, page 2, the following:

"Thereupon, and without said question being answered, said question was repeated in the following form:

Q. Just what was the condition of the vestibule door, and the steps, when you saw it, on the rear of your car? And the said witness testified as follows:

A. The door was open.

Q. On which side of the train would that be, as you walked towards the engine?

A. Left-hand side.

Q. Left-hand side, and did you observe whether or not both the door [38] and the steps were open, or was it just the door only?

A. I can't say as to that."

III.

That there be stricken from said bill of exceptions all that portion thereof beginning with the word "during," line 9, page 3, and ending with the word "objection," line 14, page 3, for the reason that no exception was either taken or allowed to the question included therein.

IV.

That there be stricken the words "to which refusal the defendant excepted and its exception was thereupon allowed," lines 24 and 25, page 4, and that there be inserted in lieu thereof the following:

"After the jury left the jury-box and had retired the following colloquy ensued between counsel for defendant and the trial court and the following proceedings occurred, to wit:

Mr. ROCKWOOD.—May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1, 2, 3, 4 and 4-a?

COURT.—That is the motion for a directed verdict?

Mr. ROCKWOOD.—Specific request to take away certain issues from the jury.

COURT.—You can have your exception, but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that exception must be taken before the jury retires.

Mr. ROCKWOOD.—That is what I had reference to when I spoke to you before; I did not care to interrupt the Court.

COURT.—You have the same thing in your motion for a directed verdict, so that matter is probably taken care of."

Dated March 17, 1931.

MARLARKEY, DIBBLE & HERBRING,
Attorneys for Plaintiff. [39]

INDEX.

Portland, Oregon, December 11, 1930.

[40–41]

[Title of Court and Cause.]

BE IT REMEMBERED that this case came on to be heard before the Honorable ROBERT S. BEAN, Judge of the above-entitled court, on Thursday, the 11th day of December, 1930, at the hour of ten o'clock A. M., the plaintiff being present in person and represented by his attorney Mr. A. M. Dibble, and the defendant being represented by its attorney, Mr. Fletcher Rockwood,

WHEREUPON the following proceedings were had: [42—1]

Mr. DIBBLE.—If the Court please, prior to making my opening statement, I would apply to the court at this time for leave to amend the plaintiff's complaint in certain respects. The amendments that we ask are confined entirely to Paragraph VII of the complaint, which is the portion which deals with the alleged negligence on the part of the company. I have written out the amendment desired. In subdivision 1 of Paragraph VII it is alleged as one of the grounds of negligence that this train was being operated at a reckless speed at a time when the train was about to enter a cross-over, and that that caused the train to give an unusual and violent lurch. I have found, in interviewing witnesses whom we will call, that the collision occurred before they had gotten to the siding proper. They were approaching, and as we say, about to enter. I wish to amend by stating that as they were about to take the siding and slowing down the train for the purpose of later entering the siding, they so carelessly and negligently operated the train as to cause it to give an unusual and unnecessary lurch, thereby causing the plaintiff to lose his balance and fall.

COURT.—You mean approaching the siding and not taking the siding?

Mr. DIBBLE.—Yes, and the lurch must have been caused by the improper operation of the train for the purpose of slowing down to take the crossing. In the second subdivision, we have alleged

that the company was careless in that, this being a vestibule train, they had carelessly left the vestibule door open between the cars, the steps and the vestibule, thereby causing— [43—2]

COURT.—You want to change that?

Mr. DIBBLE.—Want to change it in this respect: I want to add that they were negligent in having the train open at the place where they did. It will be our contention that they should not have had the train open beyond the rear end of it, and this accident occurred further up in the train, at a point where passengers would pass to and fro.

COURT.—You may serve those proposed amendments of that allegation.

Mr. DIBBLE.—And also we allege that they didn't give warning to this man that the vestibule was open, and it wasn't sufficiently lighted to apprise him of the situation. It does add this new element but I have felt, in view of the fact that they have their train crew here and have in their possession all the facts—

COURT.—See whether Mr. Rockwood has any objections.

Mr. ROCKWOOD.—If your Honor please, Mr. Dibble made a proposition to stipulate on the afternoon of Tuesday. I declined to stipulate and I wish to make formal objection at this time to the amendment, particularly going to the first amendment, the place where the accident happened. That is, whether the accident happened when the train was going on the siding, or whether the accident happened on the main line is very material under

the first allegation. I have the train crew here and have had an opportunity, of course, to discuss this with them, and they are available as witnesses on whatever theory the case is tried. I have tried to obtain some outside witnesses, that is men who are not employees or passengers on the train, but not finding [44—3] a witness from the outside, we have been satisfied to develop the fact that the train was on the main line, and being satisfied on that point, did not go to the extent of finding witnesses on the question of lurch. I have not investigated the question of lurch extensively with outside witnesses, and I wish to make formal objection to it.

COURT.—It seems to be within the discretion of the Court, and you may make your amendments.

Mr. ROCKWOOD.—I would like to note an exception. [45—4]

TESTIMONY OF WALTER L. CORNELL, FOR PLAINTIFF.

WALTER L. CORNELL, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Cornell, where do you reside, please?

A. No. 1333 Thompson Street, this city.

Q. About how long have you lived in Portland?

A. Nineteen years—eighteen years; I will correct that.

(Testimony of Walter L. Cornell.)

Q. What is your business at present?

A. Engaged in the commercial printing business, handling contracts and notes.

Q. Where is your office?

A. In the American Bank Building.

Q. Do you know Mr. Shellenbarger, plaintiff?

A. I do.

Q. And for how long have you known him, Mr. Cornell? A. About fifteen years.

Q. And state whether or not you were on the Great Northern train which has been called here the Knight Templars Special at the time Mr. Shellenbarger was injured.

A. I was.

Q. State whether or not you are a member of the Knights Templar yourself? A. I am.

Q. You were formerly, I believe, Commander of the Oregon Commandery? A. Yes, sir.

Q. And you were on the train then for the purpose of attending [46—5] this conclave to be held in Detroit, Michigan? A. Yes, sir.

Q. I wish you would state to the jury, Mr. Cornell, just where on the train you were riding at the time Mr. Shellenbarger was injured.

A. I was in the rear platform of the observation-car.

Q. And do you know about how many cars there were in the train? A. No, sir, I could not say.

Q. But there were a number of cars ahead of the observation-car? A. Yes, indeed.

Q. This observation car was the rear car of the train, was it? A. It was.

(Testimony of Walter L. Cornell.)

Q. And state whether or not it was a train having an iron railing around the back. A. It did, yes.

Q. Similar to what we see in going on trains?

A. Yes, sir.

Q. And state whether or not it had gates there so it could be opened up and get off the rear by steps. A. Yes, there were gates there.

Q. There were gates there at the rear of the vestibule, so that if it was desired by the brakeman or anybody else, they could open up the rear door and pass by steps off the rear platform. That is true, is it? A. Yes, sir.

Q. And you were riding on the rear platform of the observation-car? A. Yes, sir.

Q. I wish you would state, Mr. Cornell, to the jury, whether or not anything extraordinary or unusual occurred with respect [47—6] to the train just previous to Mr. Shellenbarger falling from it?

Mr. ROCKWOOD.—Your Honor, I object to that, because it has not been shown that this man knew when Mr. Shellenbarger fell off. We are getting down to split seconds in this case, and I think it important to limit the witness to what he knows.

COURT.—I think that is important.

Mr. DIBBLE.—We are premature in this respect.

Q. When did you first learn that Mr. Shellenbarger had been—had fallen from the train?

A. When the brakeman came on to the back plat-

(Testimony of Walter L. Cornell.)

form and explained that he had lost a Sir Knight off the train.

Q. How soon did he come back through the observation car and state that, with respect to this matter that I am inquiring about; how soon was that after this other question that I put to you?

Mr. DIBBLE.—I intend, your Honor, to follow up and show this matter. It makes it rather awkward to prove it from this back end view, but in view of counsel's objection, and what Court desires to make clear, it is perfectly proper, and the order that is proper.

Q. I am inquiring about the unusual operation of the train, what you may have observed in that regard; how close was that connected to the accident to Mr. Shellenbarger?

Mr. ROCKWOOD.—I object to that question on the same grounds.

Mr. DIBBLE.—I am going to follow it up. I will ask the other question again.

Q. I will ask you to state whether or not—

COURT.—You might ask how soon this alleged unusual [48—7] operation occurred before the brakeman came in. Maybe you can place it that way.

Mr. DIBBLE.—Yes, that is a good way to get at it.

Q. What interval of time was there from this unusual occurrence until the brakeman came through and said a Sir Knight had fallen from the train? A. Immediately after that.

(Testimony of Walter L. Cornell.)

COURT.—Immediately what?

A. Immediately after.

COURT.—What do you mean by "immediately." A minute, half a minute, two minutes, or what?

Q. Or seconds? You mean minutes or seconds?

A. I have no way of telling how much time elapsed. I can simply tell you what happened, and that is all I will attempt to do.

Q. Well, the Court would like to know, and the jury, I think, *whether was* a minute, right there at that time. A. Very short duration. I am not—

Q. State if you will, then, Mr. Cornell, to the jury, what if anything you observed with respect to the operation of this train, immediately prior to the brakeman coming through and saying that a Sir Knight had fallen from the train?

A. I was sitting on the rear platform with a Mr. Stuart, Mr. Bruce Stuart, and Mrs. Cornell and there was a lurch of the train that caused me to go forward in my chair, and Mr. Stuart says, "Something has happened." And he raised from the chair and looked out around the end of the car, and made the remark, "We are coming into a station," and immediately after that the brakeman came out on the back platform and made the statement that we had lost a Sir Knight off the train. [49—8]

Q. Now, if I understand you, then, Mr. Cornell, there were you and Mrs. Cornell, that is, your wife, and Mr. Stuart on the back of the observation car?

(Testimony of Walter L. Cornell.)

A. There may have been some other people on there, but we were over on the—well, it would be on the right as the train was proceeding east. We were on the right side, sitting there in chairs.

Q. As I understand, you were all seated?

A. All seated; yes.

Q. And state a little more particularly, if you will, the nature of this lurch that you say occurred just before the brakeman came through there. How violent was it? You described it to a certain extent. Was it just an ordinary lurch, or an ordinary swaying of the train, or was it something unusual or extraordinary?

A. We had been running at a good speed on a comparatively straight-away. Mr. Stuart was explaining the condition of the signals to my wife, and the train was running smoothly—so smoothly that when this—whatever happened, application of the brake, or soft mud, or whatever it was, it kind of caused us to go forward a little, and at that time he made this remark; something out of the ordinary; and looking ahead he then said, "Well, we are coming into a station."

Q. And he went around—he had to go around—look around the back of the car towards the front, Mr. Stuart did, to see what had happened. Was that it?

A. He was sitting near the rail. My wife was in the back, and I was pulled out somewhat in front; and he simply raised up and looked around the end of the car.

(Testimony of Walter L. Cornell.)

Q. And this lurch that you speak of was sufficient to throw [50—9] you forward in the seat, although you were sitting down?

A. Well, it was just out—extraordinary, as we had been running along, and this condition was such that it caused us to know that something was happening.

Q. And then after the brakeman came through and said a Sir Knight had fallen from the train, what was done in regard to getting the train stopped, that you know of?

A. All that I recall was that I was—as I was jumping off from the back platform, someone was pulling the cord. I couldn't tell you who that was. It was made—I couldn't say who it was. I have always been under the impression it was Mr. Sawyer, but I am not sure.

Mr. ROCKWOOD.—I move that that be stricken.

Mr. DIBBLE.—Yes, there won't be any objection to that.

Q. Then tell the jury what you did and what the brakeman did with respect to finding Mr. Shellenbarger, where he was, etc.

A. As this remark was made by the brakeman, Mr. Stuart vaulted off the back—off the rear of the platform.

Q. Was the train still in motion when he vaulted over? A. The train was still in motion.

Q. About how fast was it going then?

A. I couldn't tell you. It was moving; it was moving when I went off the train. The brakeman

(Testimony of Walter L. Cornell.)

was unlocking the gate, and as he pulled open the gate I jumped to the ground, and Mr. Stuart was running ahead with the lantern.

Q. Mr. Stuart got off first, did he?

A. Stuart was the first man off the train.

Q. Then who got off next? Did you get off ahead of the brakeman?

A. I was ahead of the brakeman, but I don't know whether [51—10] anyone was ahead of me or not. It was rather an exciting moment, and we were running back to find the man who had fallen off the train.

Q. Where was the train finally brought to a stop? How far from the place where Mr. Shellenbarger was thrown off?

Mr. ROCKWOOD.—I object to that. I don't think this witness knows. He left the train, he wasn't on the train when it stopped.

Mr. DIBBLE.—I believe he does know. I think we can clear that up—develop that.

Q. State whether or not you walked back and found Mr. Shellenbarger. A. I did.

Q. How did you get back from where he was, to the train?

A. After the boys had carried Mr. Shellenbarger from the position in which we found him, they secured an automobile and there was a road to the left, and they took Mr. Shellenbarger, carried him across the space intervening, and put him into this car, and I walked back with the brakeman.

Q. That is what I am getting at. You walked

(Testimony of Walter L. Cornell.)

back from where Mr. Shellenbarger was lying on the right of way; you walked from there back to where the train finally stopped? A. Yes, sir.

Q. With the brakeman, to Saco. Isn't that true?

A. Yes, the brakeman and I walked back.

Q. You know how far you walked, don't you? How far was it from where Mr. Shellenbarger was found on the right of way, back to where you got on the train again?

A. I would say about half a mile.

Q. About half a mile. And you walked that distance along [52—11] with the brakeman?

A. Yes, sir.

Q. Do I understand you to say there was a county road, a public road, that paralleled the track back there, and Mr. Shellenbarger was put in an automobile on that county road, and transported that way back to Saco? A. Yes, sir.

Q. Is that true?

A. He was taken back to the train.

Q. From the time you got off the train, Mr. Cornell, and while you were walking back to find Mr. Shellenbarger, was the train—state whether or not the train was still in operation? Did it stop right there as an emergency stop, or did it go on and make a siding?

A. I was not walking back; I was running back. I know nothing about what the train was doing while I was running back.

Q. What I am getting at is, did the train stop

(Testimony of Walter L. Cornell.)

after Mr. Shellenbarger was thrown off, until it got clear on this siding, as far as you know?

Mr. ROCKWOOD.—I object to that. As I said, he doesn't know anything about the train operation.

COURT.—He wasn't watching the train. May tell if he can where the train was when he boarded it.

Q. Yes, where was the train when you came back with the brakeman and boarded it, after Mr. Shellenbarger was thrown off?

A. When we found Mr. Shellenbarger—

COURT.—Where was the train when you came back, Mr. Cornell? When you went back to the train after you found him, on the main line, or on the siding?

A. The train was on the siding, in the station. [53—12]

Q. But you don't know—and if you don't, you would not have a right to say, you don't know whether or not it stopped after Mr. Shellenbarger was thrown off, before it came to this point where you saw it afterwards? A. I do know, yes.

Q. What did happen with the train?

Mr. ROCKWOOD.—Just a moment. May I ask a question?

Mr. DIBBLE.—Surely.

Mr. ROCKWOOD.—You said, Mr. Cornell, that you knew nothing about the operation of the train while you were running back?

A. While I was running back, sure.

Mr. ROCKWOOD.—Now you say you do know

(Testimony of Walter L. Cornell.)

about the operation of the train. Before you answer the question, I wish you would explain the inconsistency of those two answers.

A. There is nothing inconsistent about it. When I was running back I did not know what happened to the train, but after we found Mr. Shellenbarger, signals were given by Mr. Stuart, or were attempted. We were trying to get the train to back up, and instead of the train backing up, we could see that it was going ahead, and it did go ahead.

Q. Beyond the siding?

A. I don't know what it made. When I got back the train—after I had left the train, it had stopped. When we found Mr. Shellenbarger then the train was standing still, stopped, and while we were there Mr. Stuart was giving signals with the lantern, attempting to get that train back to pick this man up, but instead of doing that the train moved ahead. I remarked to the brakeman that the train was moving ahead, and he said it had to go into the crossing. [54—13]

Q. And state whether or not this train that was coming towards it, that seemed to have the right of way, did that come past this train while you were on the right of way there walking back?

A. Yes, the train went through while I was walking back with the brakeman; the fast train went by us.

Q. Where did you find Mr. Shellenbarger? Where was he lying?

A. He was between the two tracks. It was a

(Testimony of Walter L. Cornell.)

double track there, one under construction, or was being repaired, and the main line. We found him between these two tracks.

COURT.—On the right side, or left side of the train?

A. He would be on the left side of our track, as we were going east.

Q. Was he lying on his back, or on his side, or how?

A. Mr. Stuart was holding him, and as I reached there he asked me to support Mr. Shellenbarger.

Q. Mr. Stuart asked you?

A. He was sitting down.

Q. He was sitting down? A. Yes.

Q. What was Mr. Shellenbarger's condition, was he conscious?

A. Oh, no, absolutely not. He was bleeding badly from the head, and I held him there during the time that we—they were trying to get—while they were waiting for the machine to come pick him up.

Q. Did you notice his watch?

A. Later. At the time Mr. Stuart—at the time they carried—after they carried Mr. Shellenbarger across to the car, Mr. Stuart asked me if I would see if there were any belongings of the man; and I found his watch, and his glasses. [55—14]

Q. Where was his watch?

A. His watch was lying in the ground.

Q. Was it loose from his vest?

A. Loose from his vest entirely.

(Testimony of Walter L. Cornell.)

Q. Where were his glasses lying?

A. Glasses on the ground. I found those later, and also a pencil, I believe, and a memorandum-book.

Q. Were the glasses broken?

A. They were not.

Q. And you held his head up, did you?

A. I did.

Q. How extensive was the bleeding you noticed there? Where was the blood coming from?

A. From his head some place, but I couldn't tell you where.

Q. Did you have your arm under the back of his head, supporting him up?

A. Yes, I had my arm around back, left arm around back, and my entire sleeve and shirt was a mess of blood when I got back to the train. I had wiped some of it off my hands on my handkerchief, but the rest of it—

Q. Did you change your shirt when you got back to the train?

A. I don't think I changed my shirt; I think I went to bed.

Q. About time to go to bed? A. Yes, sir.

Q. After the boys came down the highway paralleling that track, with an automobile, they took Mr. Shellenbarger, as I understand it, and lifted him over a wire fence into this car. Was that it?

A. I am unable to say. I didn't assist in carrying him at all. They simply carried him from the

(Testimony of Walter L. Cornell.)

spot where we found him, and [56—15] the brakeman and myself were the only ones left.

Q. You and the brakeman walked back along the right of way then, did you?

A. Along the right of way to the station.

Q. Along the right of way to the station at Saco, to where the train was standing on the siding?

A. That is correct.

Q. And while walking back with the brakeman, this fast train came right through? A. Yes, sir.

Q. Was it very long from the time when you got back to where Mr. Shellenbarger was, that this fast train came through?

A. Well, it must have been several minutes. Must have been in the neighborhood of ten minutes, I would imagine, because we had carried Mr. Shellenbarger there. He was not there at all at the time the train came through. Only the brakeman and myself walking up the right of way. The other boys had all gone, they had taken Mr. Shellenbarger and gone with him in the machine.

Q. Do you know whether or not this train that had the right of way, stopped up there at Saco, or whether it came right on through as was planned?

A. I cannot say.

Q. You do not know of your own knowledge?

A. I do not, no.

Q. Now, in walking back with the brakeman, did you have any conversation with him as to how the accident occurred?

A. Yes, I had a conversation with the brakeman.

(Testimony of Walter L. Cornell.)

Mr. DIBBLE.—Which one is the brakeman, Mr. Rockwood, [57—16] is he in the courtroom?

Mr. ROCKWOOD.—Yes. (To the brakeman.) Will you stand up?

A. Looks like the man.

Q. That is the gentleman. Do you recognize this gentleman here? A. Well, I am—

Mr. ROCKWOOD.—That is all right Mr. Brown; sit down.

A. Well, I am unable to recognize him. I couldn't swear absolutely he was the brakeman. I only know I had a conversation with the brakeman on the train.

Q. Did you have a conversation with the same man that came through the observation car and said a Sir Knight had fallen off the train?

A. The same man, yes.

Q. The same man. And what did he say, if anything, as to how the accident occurred?

Mr. ROCKWOOD.—I object to that, if your Honor please, as incompetent, irrelevant, immaterial, and hearsay; not a part of the *res gesta.*

COURT.—I think the objection is well taken. The brakeman could not by any declaration he made after the event, bind his principal.

Mr. DIBBLE.—That is probably true; I will not insist on it.

Q. I will ask you this question: State whether or not you noticed the condition of this vestibule at the rear of the coach ahead of the observation car, before the accident, or afterwards?

(Testimony of Walter L. Cornell.)

Mr. ROCKWOOD.—I object to that as incompetent and irrelevant, because the condition afterwards certainly does not tend to prove the condition at the time of the accident. [58—17]

COURT.—I think when he went back to the train, if he examined it, he might tell what he saw. It may not be very material.

Mr. DIBBLE.—Of course it might have been closed by that time, I appreciate that.

Mr. ROCKWOOD.—Lots of things could have happened.

Q. I will just ask you now, Mr. Cornell, did you take any notice or observation of the condition of the vestibule at the rear of the coach ahead of the observation car, at any time before or after the accident? A. I did not.

Q. And in walking back with the brakeman after the accident, did the brakeman make any statement to you with regard to whether the vestibule and steps were open at the time the accident occurred—that is a little different, your Honor.

Mr. ROCKWOOD.—Now, I have no objection to his answering as to whether the brakeman did, or did not, make a statement, but I want it limited to that. Just, did the brakeman make a statement? Don't say what he said.

COURT.—Just answer yes or no.

Q. You have no right to say what the brakeman told you; but did the brakeman make any statement to you as you walked back there, as to whether the

(Testimony of Walter L. Cornell.)

door and steps were open or not at the time Mr. Shellenbarger fell?

Mr. ROCKWOOD.—Just whether he made a statement. Don't say what he said.

COURT.—Whether any statement. Not what he said, but did he make a statement to you?

A. Yes, he made several statements to me. [59—18]

Q. And state whether or not you asked the brakeman how the accident occurred—just yes or no.

Mr. ROCKWOOD.—Just answer that yes or no.

A. Yes.

Q. And state whether or not, yes or no, he answered your question and stated to you how he claimed that the accident occurred? A. Yes.

Q. Now, was this train what we call a vestibule train; between the coaches had vestibules, or had you been back and forth in the train during the trip there?

A. Yes, I had been back and forth on the train.

Q. Where was your coach with respect to the observation car?

COURT.—I infer from Mr. Rockwood's statement, there is no controversy.

Mr. ROCKWOOD.—No, no controversy.

Mr. DIBBLE.—Throughout the train?

Mr. ROCKWOOD.—Yes.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Now, when you were sitting on the observation

(Testimony of Walter L. Cornell.)

car platform, you were looking back, were you, at the signals on the track in the rear of the train?

A. Yes, sir.

Q. You were facing the rear of the train?

A. Yes, sir.

Q. And I assume that the chairs you were sitting in had backs? You were leaning back in the chair, you were not sitting on stools, were you?

A. That I could not say. There were both kinds there, I am [60—19] not sure of that.

Q. You don't know whether you were sitting on a chair, or on a stool? A. No, I do not.

Q. Do you know whether Mr. Stuart was sitting on a chair, or on a stool? A. I do not.

Q. Now, when this occurrence happened which caused you to move forward a little in the chair, do you remember whether you leaned out into space, or did it just put you back against the back of the chair a little bit? Do you remember?

A. I am not sure whether—I just know there was a slight commotion there, which caused Mr. Stuart to make this remark and tell us he thought we were coming into a station.

Q. What was it? You say a slight motion which caused him to make a remark. You had felt that same kind of slight motion on other occasions when the train was stopped, hadn't you?

Mr. DIBBLE.—I think he said "commotion."

A. Commotion.

Q. Had you been on the platform at other station stops?

(Testimony of Walter L. Cornell.)

A. Yes, I had been about the train all the time.

Q. Had you been sitting on the observation platform at other times the train had stopped, do you remember? A. I am not sure of that.

Q. Well, was this—can you remember, was this a slight motion, or a slight commotion, was it just about the same kind of motion in the train that you would get at other station stops when the train was slowing down in operation?

A. I am not sure whether that the feeling would be like [61—20] it would in another station or not, there is all kinds of motions on trains.

Q. Sure. In walking up and down through the train while the train was running along regularly, you were conscious all the time of the motion of the train, and that you had to kind of balance yourself from the motion of the train?

A. I always had to.

Q. And when the train goes around a curve you are conscious of the fact that you have to balance yourself and steady yourself on the curves, don't you. Isn't that true?

A. If *you walking* down the train?

Q. Yes. A. Down the car?

Q. Sure.

A. Yes, surely you have to balance yourself.

Q. And this accident happened while the train was running on a perfectly straight track, wasn't it?

A. That is my understanding, yes, sir. I am sure of that, straight track.

Q. It is your estimate that the point where you

(Testimony of Walter L. Cornell.)

picked up Mr. Shellenbarger, or found Mr. Shellenbarger, was about half a mile from the point where the train stopped, and where you came back to the train after the accident?

A. That would be my best judgment.

Q. Of course you didn't pace it, and you had no way of measuring it? A. None whatever.

Q. That is just your recollection?

A. That is just my judgment in the matter. [62—21]

Q. Do you remember whether—first, did you walk back along the track, or along the road?

A. Back to the station?

Q. Back to the train, afterwards?

A. Along the track.

Q. Now, in walking along the track, did you walk over a bridge, do you remember?

A. There was a culvert I believe, of some kind; I wouldn't say it was an extensive bridge, but there was a culvert, and—well I know that; I know we went over a culvert coming back.

Q. Pretty large culvert; was big enough so you could see it in the night?

A. Yes, I noticed it as I was coming back.

Q. When you ran back to Mr. Shellenbarger do you remember running over that culvert?

A. I do not.

Q. So that culvert then was, apparently, on the basis of your testimony, between the point where Mr. Shellenbarger fell off, and the station?

A. Yes, sir.

(Testimony of Walter L. Cornell.)

Q. Now, is your recollection very definite as to the place where Mr. Stuart was located on the observation platform, prior to the time you were told by the brakeman— A. That he was there?

Q. As to his precise location on the platform?

A. Well, I think so, yes, sir.

Q. As a matter of fact, Mr. Cornell, wasn't Mr. Stuart standing up with his back against the railing, on the back end of the platform, which would make him facing toward the front of the train? [63—22] A. I don't believe.

Q. You don't? A. No, I don't believe.

Q. That isn't your recollection?

A. It is not my recollection at all.

Q. You say when you jumped off someone was pulling the cord? Where was that man standing that was pulling the cord?

A. Standing on the rear platform.

Q. Somebody by that time was on the rear platform pulling the cord?

A. Yes, the rear platform of the observation car.

Q. When you felt this slight commotion that you referred to, have you any way of estimating what the speed of the train was at that time?

A. No, I have no way.

Q. There was nothing so unusual about the speed at that time that your attention was called, or concentrated on the speed in any way, was there?

A. We were slow—we had been running rather fast, and we were slowing down. We were running slower than we had been, at the time this jar or

(Testimony of Walter L. Cornell.)

lurch came there, and it was sufficient to cause Mr. Stuart to get up and look to see what was the matter.

Q. Now, do you recall whether you had slowed down before you felt this slight commotion? Had the train slowed down from its running speed before you felt that slight commotion?

A. I would say yes.

Q. It had slowed down, then you felt the slight commotion. Did you examine the ground near the spot where Mr. Shellenbarger [64—23] *Mr. Shellenbarger* was found, to see whether there were any marks on the ground of sliding, or foot marks, or anything such as that?

A. I did examine it, yes, sir.

Q. Could you find any indications on the ground that Mr. Shellenbarger had slid or moved as he hit the ground.

A. The imprint of his body was there; shoulder and his head were very clear in the ground. There was soft dirt where he fell, or rather where we found him.

Q. Was that imprint of his body there right at the spot you found him later?

A. It was right at that spot.

Q. So that the fact is that from the time his head struck the ground he didn't move or slide forward in the direction in which the train was moving. Is that correct—from the instant his head hit the ground?

A. Well, I can't tell you that. There was—the people had been gathered around there, and there

(Testimony of Walter L. Cornell.)

were a great many footprints, etc. We just had—I noticed that particularly where the imprint of his body was there.

Q. You say the ground was soft. As a matter of fact there was some new construction work just to the north of the main line track, right at that location, wasn't there; between the main line track and the county highway, there was some new construction, a new fill; is that right?

A. There was another track there that was being worked upon, and there were some rails that were between these tracks, to the east of where we found him.

Q. Now did you walk along that other track at all to examine it? Can you give us any detail as to that other track? [65—24]

A. It was in a rough condition.

Q. In a rough condition?

A. In a rough condition. My reason for knowing that is that when this train started to come through, the fireman was walking down in the right of way between that, but I took no chances. I climbed up on this other track, and in fact it was in—it was under repair or something of that kind; it was rough.

Witness excused. [66—25]

TESTIMONY OF MRS. GEORGIA H. CHENEY, FOR PLAINTIFF.

Mrs. GEORGIA H. CHENEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mrs. Cheney, you are the wife of Rufus Cheney, are you? A. I am.

Q. He is the Grand Secretary, I guess, of the Masonic Order in Oregon, is he? A. He is.

Q. Has been for many years. A. Yes, sir.

Q. Will you state, Mrs. Cheney, whether or not you were on this Knight Templars special?

A. I was.

Q. At the time Mr. Shellenbarger was injured?

A. I was.

Q. And in what coach were you riding with respect to the observation car?

A. The coach next to the observation-car.

Q. Would you say the car you were riding in was the one just immediately ahead of the observation-car? A. It was.

Q. And did you see the accident itself? Were you there to see how it did happen? A. I did not.

Q. How did you know there had been an accident, or that Mr. Shellenbarger had been thrown from the train? How did you learn that?

A. Someone came to our stateroom and said so.

(Testimony of Mrs. Georgia H. Cheney.)

Q. Do you recall who that was? A. I do not.

Q. How soon after it happened did they say there had been a man thrown from the train?

Mr. ROCKWOOD.—I object to that; this witness can't tell.

COURT.—How soon after thrown from the train? How does she know.

Q. Do you know who it was that notified you there had been an accident? A. I did not.

Q. What did you do, if anything, after you learned there had been an accident?

A. I went out on the platform.

Q. Was that the rear platform of your car?

A. It was.

Q. And what was the situation there with respect to the vestibule and the steps?

Mr. ROCKWOOD.—I object to that, your Honor. It has not been shown that the condition at that moment was the same as when the accident happened.

COURT.—I think that is probably for the jury.

Mr. ROCKWOOD.—Save an exception.

COURT.—You can explain it, yes.

Q. Just what was the condition of the vestibule door, and the steps, when you saw it, on the rear of your car? A. The door was open.

Q. On which side of the train would that be, as you walked towards the engine?

A. Left-hand side.

Q. Left-hand side, and did you observe whether or not both [68—27] the door and the steps were open, or was it just the door only?

(Testimony of Mrs. Georgia H. Cheney.)

A. I can't say as to that.

Q. And at the time you observed this open door at the left side of the vestibule of the rear of this car, had the train stopped at Saco yet? That will give us some idea about how soon it was after the accident occurred?

A. I think it was slowing down for the station at that time.

Q. Hadn't stopped there on the siding at Saco?

A. I think not.

Q. When you observed the condition of this door; is that true? A. I think so.

Q. And then did you—now what had you been doing if anything just previous to your going out there and observing the condition of this vestibule door and steps? What were you doing just before that? A. Playing cards.

Q. And in your compartment of this car of yours?

A. Yes, sir.

Q. Right ahead of the observation-car?

A. Yes, sir.

Q. And who were you playing cards with?

A. Three other parties. Having a game of bridge.

Q. A game of bridge with Mr. Cheney, if I might lead a little bit? A. Mr. Cheney.

Q. And Mr. Freck? A. Mr. and Mrs. Freck.

Q. Mr. and Mrs. Freck, and the four of you were playing bridge in the compartment of your car, which was the first car ahead of the observation car? A. Yes, sir. [69—29]

Q. State whether or not, Mrs. Cheney, anything

(Testimony of Mrs. Georgia H. Cheney.)

unusual occurred with respect to the operation of the train, immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

Mr. ROCKWOOD.—I object to that, if your Honor please. I hate to make these objections constantly, but I object to that on the ground that the time is not fixed as being coincident with the accident.

Mr. DIBBLE.—I think the time is pretty well fixed, because the witness has already testified that at the time she observed the door to be open, that the train was slowing down to make this stop at Saco, to take the siding, which is shown to be about half a mile.

COURT.—I think that is for the jury.

Mr. DIBBLE.—So I think that is as close as we could get it there.

(Question read.)

A. There was a decided jerk to the train.

COURT.—What?

A. A decided jerk of the train, enough to throw me against the card-table.

Q. You were sitting down, playing bridge there—

COURT.—She has already testified.

Q. And state whether or not that decided jerk that you spoke of, was that just an ordinary swaying motion of the train? A. It was not.

Q. And how violent a jerk was it? Just tell the jury as clearly as you can, so they will appreciate the severity of it. [70—30]

(Testimony of Mrs. Georgia H. Cheney.)

A. It was forcible enough to throw me against the card-table; had not the table been there, I think I should have fallen on the floor.

Q. Supposing you had been standing up, or walking along, and had not been sitting down in your seat—

COURT.—That is not proper.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Mrs. Cheney, you say when you got to the platform the train was just going to stop at Saco?

A. It was slowing down.

Q. Now you of course have no way of telling when Mr. Shellenbarger fell from the train?

A. I have not.

Q. And you don't know how long after he fell from the train, this gentleman, whoever he was, came through and told you that Mr. Shellenbarger had fallen from the train?

A. After I felt that jerk, it must have been five or six minutes, when someone came in.

Q. Five or six minutes. When this gentleman came through to tell you about this, did you then immediately get up from the card-table and start out? A. If I remember rightly, I did.

Q. Of course you have no way of telling what happened with respect to the operation of the train between the time Mr. Shellenbarger fell off and the time when you were notified? A. I have not.

Q. You don't know whether or not somebody gave a signal to stop in between the time Mr. Shel-

(Testimony of Mrs. Georgia H. Cheney.)

lenbarger fell off, and the [71—31] time you felt this jerk, do you?

A. I don't remember hearing a signal.

COURT.—What?

A. I don't remember hearing a signal.

Q. I beg pardon?

A. I don't remember that I heard a signal.

COURT.—You would not have heard it probably if it had gone through to the engine.

Q. The question is, you have no way of knowing personally whether any such thing was done?

A. No, I have not.

Redirect Examination.

(Questions by Mr. DIBBLE.)

Just one little matter to clear up there. I think a little confusion. If as shown by the testimony it was half a mile there from where Mr. Shellenbarger fell from the train up to the siding there at Saco, where the train stopped, and if as you say, the train was still in motion and had not got to Saco yet when you went out, and there was an open vestibule door there, if that is true, it couldn't have been five or six minutes.

COURT.—Oh, no, no. She has testified to that.

Mr. ROCKWOOD.—The testimony of your own preceding witness is there was an intervening stop of the train.

COURT.—You can argue that to the jury if you want to.

Mr. DIBBLE.—I was busy talking with another witness, and I didn't get all your testimony, of

(Testimony of Mrs. Georgia H. Cheney.)

course. But I understood you said it was five or six minutes.

A. Five or six minutes.

Q. From the time this man fell from the train, until you saw [72—32] the open vestibule?

Mr. ROCKWOOD.—She didn't say that at all.

COURT.—No, no.

A. From the time someone came to my stateroom.

COURT.—Four or five minutes after she felt the jar of the train, before this man came to her stateroom.

A. After I felt the jar of the train.

Q. But after you felt this distinct jerk you spoke of, you said you went right then to this vestibule?

A. No, I did not. Not until someone said that someone had fallen from the train.

COURT.—Four or five minutes.

Mr. DIBBLE.—I believe that is all.

Witness excused. [73—33]

TESTIMONY OF D. B. STUART, FOR PLAINTIFF.

D. B. STUART, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

You live where, Mr. Stuart?

A. Corvallis, Oregon.

Q. Are you connected with the State College there? A. I am.

(Testimony of D. B. Stuart.)

Q. In what capacity?

A. Superintendent of Light & Power.

Q. You are a Knight Templar? A. I am.

Q. And were you on this Knight Templar Special at the time Mr. Shellenbarger was injured?

A. I was.

Q. You have heard the testimony of Mr. Cornell, the first witness we called? A. I did.

Q. Do you know him? A. I do.

Q. Do you recall whether or not you were on the rear of this observation train with him?

A. I was.

Q. How long was that before the accident, about?

Mr. ROCKWOOD.—Just a moment.

COURT.—What?

Mr. DIBBLE.—How long was that before the accident that you were on the back? [74—34]

COURT.—Does he know when the accident occurred? A. I think I do.

COURT.—We don't want any "think" about it, because that is the important question in this case.

Mr. ROCKWOOD.—I have no objection to his stating how long he had been on the platform prior to the time he heard of the accident.

COURT.—Certainly, that would be all right.

Mr. DIBBLE.—That is what I was asking.

Q. You recall being at the rear of the observation platform or the observation car, with Mr. Cheney and his wife? A. Yes, sir.

Q. Were you riding there at the time the accident occurred? A. I was.

(Testimony of D. B. Stuart.)

Q. You didn't actually see the accident then?

A. Couldn't.

Q. How soon would you say it was after the accident occurred, that you knew it had occurred?

COURT.—You have asked that question two or three times. How can he know how soon it was after the accident occurred?

Mr. DIBBLE.—I thought the brakeman came through.

COURT.—He can testify when he was told of the accident.

Q. That is what I mean. State whether or not anybody in connection with the train *and* said an accident had happened?

A. A man in train uniform came running back to the vestibule of the observation car, I mean the extreme rear now, of the observation car, and he says, "My God, a Sir Knight went overboard!" as I remember. Maybe he said fell overboard, but it had something to do with the fact that a Knight Templar [75—35] had left the train.

Q. Was this man you spoke about being in uniform, was he running or walking through the train?

A. He was getting back to the rear of that train just as fast as he could.

Q. State whether or not the train was in motion at that time. A. It was.

Q. And where did he go, this man, that is. Did he go to the back end?

A. Now ask me that again, will you please?

(Testimony of D. B. Stuart.)

Q. Where did he go as he came through the train? Did he go to the back end of the observation-car?

A. You have reference to this—

COURT.—The brakeman.

A. He was going to the rear of the train, yes.

Q. What did he do, and what did you do?

A. I don't know what he did.

Q. What did you do?

A. I vaulted over the back of the train and started running back.

Q. Now, I wish you would state, Mr. Stuart, whether anything unusual occurred with respect to the operation of the train, immediately prior to the time that this brakeman, or this man in uniform, came through the observation-car saying—whatever it was—"My God, a Sir Knight has fallen off the train!" Did anything unusual occur there before his coming in there to make this statement?

A. Mr. and Mrs. Cornell and—

COURT.—Did anything unusual occur? That is what we [76—36] want to know, and if so, what was it?

A. Mr. and Mrs. Cornell and myself were in conversation—

COURT.—That hasn't anything to do with it.

Mr. ROCKWOOD.—Not responsive.

A. And during that conversation there was a change in the rhythm of that train's progress.

COURT.—How long was that before the brakeman came in and told you about the accident?

(Testimony of D. B. Stuart.)

A. My opinion is that it was about the length of time it would take a man to run and make that.

COURT.—Never mind about that. In minutes,—can't you tell in minutes?

A. No, sir, I can't. I would rather not state that; I don't think it was a minute.

Q. What if anything did you do when you noticed this change of rhythm? Did you do anything to find out what was the cause of it?

A. I stepped to the left side of the platform—of the observation platform of the car, and looked ahead.

Q. Previous to this time had you been explaining to Mrs. Cornell about the signals, operation of the train, etc.?

A. The electrical part of it, to Mr. and Mrs. Cornell, yes.

Q. Are you familiar with that?

A. I was familiar with the blue-print construction of it.

Q. At the time this change of rhythm of the train occurred, were you standing up or sitting down?

A. I was standing.

Q. And at the time it occurred did you know what it was that caused it? A. No, sir. [77—37]

Q. Is that the reason you went around to the back of the car to look ahead and see?

A. Yes, sir.

Q. Was it the ordinary movement of the train then? A. No, sir.

Q. And how violent a change of rhythm, as you

(Testimony of D. B. Stuart.)

call it, was there? How extraordinary was it? How violent was it?

A. I don't believe I know how to answer that question accurately and intelligently, I want to answer it as honestly as I can; I don't know the means of describing that.

Q. State whether or not the thing that happened there was just the ordinary swaying movement of a train when it is being properly operated, or was it an extraordinary movement of the train?

Mr. ROCKWOOD.—I object to that, because it calls for a conclusion of this witness as to what is proper operation.

COURT.—I think so. You can tell what effect it had on you.

Q. What effect did it have when you were standing there?

A. I was leaning against the rear railing of this observation platform.

COURT.—Did it disturb you in any way so you swayed to one side or the other?

A. In truth I don't know, for immediately when this interruption of this train's movement came, I went to the left and looked ahead like that, and remarked something to this effect to Mr. and Mrs. Cornell, that I wondered what had happened.

Q. Your purpose in going there, looking ahead, was to find out what had caused this movement you spoke of? [78—38]

Q. Is that true? A. That is true.

Q. And you couldn't tell from standing there,

(Testimony of D. B. Stuart.)

what had caused it, but you would go around and look and see what did cause it.

A. I stepped to the left side of that platform and looked ahead, and seeing some lights there, assumed we were coming into a depot of some sort, and I didn't even know where we were. It was dark.

Q. When you got off the train were you the first one that got off?

A. I believe I was; yes, sir.

Q. Did you go back to where Mr. Shellenbarger was? A. Yes, sir, I went back to find him.

Q. Where was he found? Describe that briefly.

A. There were two tracks, one track our train was on, heading east. There was a track to my right as I ran back. Mr. Shellenbarger was between the two.

Q. Was he conscious or unconscious at the time?

A. Oh, no, he wasn't conscious.

Q. What was the condition of the roadbed there, was there mud there, some soft mud, or hard ground?

A. It was not hard ground. I reached the conclusion that it was a fill of some sort, and that it was not dry land.

Q. Did you notice his condition, was he bleeding?

A. I did not at that time know anything about any blood. I learned of it later. But I personally did not know of any blood at that time. I was more concerned as to whether his legs, arms, or any portion of his body was broken.

(Testimony of D. B. Stuart.)

Q. Did you assist in having him taken to an automobile? [79—39] A. Yes, sir.

Q. And who took him into the car, the automobile?

A. I would assume it was Mr. Freck and Mr. Cheney, but I do not know. It was dark. I know they were present. I know I helped. I tried to steady him as we came back along the road to this little town of Saco.

Mr. ROCKWOOD.—When was that? Was that after they came back to Saco that Mr. Freck and Mr. Cheney helped with him? Or had they got back to where he was lying?

A. Mr. Freck and Mr. Cheney were on the train. Now I am assuming that train to be stopped at Saco. I don't know when that train stopped. They stepped off this train and commandeered, to put it in a word, a man with an automobile at the station.

COURT.—That is not back where you found Mr. Shellenbarger?

A. No, sir, not when we stepped off the train.

COURT.—That is what counsel wants to know.

Q. How did you get back to the train again?

A. I went back in the car that Mr. Cheney and Mr. Freck drove up there.

Q. Went right along with Mr. Shellenbarger?

A. Yes, sir, was holding him in the car this way, trying to keep him from all the jar possible, and we were hurrying to get back.

(Testimony of D. B. Stuart.)

Q. Where was the train when you reached it? Where was it standing?

A. It was stopped across the street, as I remember.

Q. Was it on the siding, or the main line?

A. I don't know.

Q. Was it off the main line? [80—40]

A. I don't know, because we merely put Mr. Shellenbarger in the baggage-car and turned him over to some physician. I don't know where the train was. I paid no attention.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

I just want to get this perfectly clear. You had been on the observation platform with Mr. and Mrs. Cornell for some little time, some half an hour or so before the accident happened?

A. I would think it was longer than that.

Q. And very shortly before this train man came through to say that a Sir Knight had fallen overboard, you were leaning against the rear railing of the observation platform. Is that correct?

A. That is correct.

Q. And facing towards the front of the train?

A. Facing as we were traveling. I was facing towards the engine.

Q. Looking through the doors into the inside of the observation car?

A. In that direction, yes; I was facing that way.

Q. Then you were conscious of a change in the rhythm of the movement of the train?

(Testimony of D. B. Stuart.)

A. Yes, sir.

Q. And shortly after that a man came through and told you that a man had fallen overboard?

A. Yes, sir.

Q. Between the time that you were conscious of this change in rhythm, and the time that the man came through, you stepped over to the left or north side of the train, and glanced out. [81—41] Is that correct? A. To my left, yes, sir.

Q. Well, if the train were running east, that would be to the north side of the track. That is correct, is it? A. It would, yes.

Q. And do you remember after glancing out, did you go back to your position, or did the man come through at about that instant?

A. I don't know; there was quite a bit of confusion there. I don't know.

Q. Now, you say a change in the rhythm. The train had been running along on the main line prior to this change in rhythm. Is that correct?

A. I believe it to be, yes, sir.

Q. And the change in rhythm didn't knock you down, did it?

A. It couldn't. I was braced against the railing.

Q. You were leaning against the back rail on the train. Did it throw you to one side or the other of the platform? A. I don't remember.

Q. It wasn't a sufficient jerk so that it made any material impression on your mind, except that you probably were coming into a station. Is that correct?

(Testimony of D. B. Stuart.)

A. No, I don't quite believe that is a statement of fact.

Q. That was the conclusion you drew when you felt this change in rhythm. Is that correct? So you went up to see? A. No, it was abrupt.

COURT.—What?

A. It was an abrupt change in the motion of this train.

Q. Now, on a train you have felt such an abrupt change as that many times, haven't you—riding and walking in and through trains? [82—42]

A. I don't think quite as abrupt as that occurrence, no.

COURT.—You mean by "abrupt" such as would occur if the train stopped suddenly, or attempted to stop suddenly?

A. I believe that would partially explain it, yes. I thought they had made a sudden attempt to stop.

Q. You don't know, of course, Mr. Stuart, whether between the instant Mr. Shellenbarger actually fell off the train, and the moment the brakeman told you that a Sir Knight had fallen overboard, whether anybody had given any signals to the trainmen or whether any change in the movement of the train had occurred, do you?

A. I do not know that any signals had, or had not been given.

Q. You don't know whether Mr. Shellenbarger fell off before or after this change in rhythm that you refer to. You don't have any personal knowledge? A. No, I don't think I could have.

(Testimony of D. B. Stuart.)

COURT.—Didn't some witness say he thought Mr. Stuart gave a signal from the bell-rope?

Mr. DIBBLE.—No, Mr. Sawyer.

Redirect Examination.

(Questions by Mr. DIBBLE.)

State whether or not there were some signals given when the brakeman came through and said a Sir Knight had fallen off; there were some signals given to stop the train, weren't there? Somebody pulled the cord.

A. To save me I don't know why I should. I started running back with the brakeman's lantern.

COURT.—You don't know about it?

A. I do not. I gave some signals with the lantern, in attempting [83—43] to bring the train back; but it continued on. I learned afterwards it did that to pass another train, or to permit another train to pass it.

Q. You didn't pull the cord to stop the train?

A. No, sir, I touched no cord. I was right over the back of that train as soon as I heard.

Witness excused.

Recess until 2 o'clock. [84—44]

Thursday, Dec. 11th, 1930, 2 P. M.

TESTIMONY OF MRS. J. L. FRECK, FOR PLAINTIFF.

Mrs. J. L. FRECK, a witness called in behalf of plaintiff, being first duly, sworn, testified as follows

Direct Examination.

(Questions by **Mr. DIBBLE.**)

Mrs. Freck, have you ever been a witness before?

A. No, sir.

Q. This is your first experience? A. Yes, sir.

Q. This is the jury right here, and they want to know the facts; and the Judge sits there by your right. You live in Portland? A. Yes, sir.

Q. And about how long have you lived here, Mrs. Freck? A. Since 1911.

Q. And you are the wife of J. O. Freck?

A. Yes, sir.

Q. And you have some business here in Portland?

A. Yes, sir.

Q. What business do you conduct?

A. We have a stationery and office supply store.

Q. Where is that located?

A. 185 Sixth Street.

Q. And will you state, Mrs. Freck, and keep your voice up so these gentlemen can hear you—state whether or not you were on this Knight Templar Special at the time Mr. Shellenbarger fell from the train? [85—45] A. I was.

Q. You and your husband were making the trip?

(Testimony of Mrs. J. L. Freck.)

A. Yes, sir.

Q. Back to the Convention, were you?

A. Yes, sir.

Q. Do you know Mr. Shellenbarger, the plaintiff? A. Yes, sir.

Q. How long have you known him, about?

A. Off and on for the last ten or twelve years.

Q. And which coach of the train was your compartment in, if you remember?

A. We had our compartment in the last coach, in the observation car. The train we had at that time had I think two or three compartments in the last coach.

Q. When you say the last coach you mean the coach immediately ahead of the observation car?

A. No, it was in the observation car coach; it was divided. We had our compartment in that coach, that is, Mr. Freck and I did.

Q. Now, state whether or not you actually witnessed the accident? Did you see Mr. Shellenbarger fall from the train? A. No, sir, I did not

Q. What was the first notice you had that there had been an accident?

A. We were visiting in another compartment in the coach ahead, and some party stepped to the door, pushed it open, and said, "We have lost a Sir Knight."

Q. Now, at the time that that notice was given, you were, if I understand you, then in the coach immediately ahead of the [86—46] observation car? A. We were in that coach at that time.

(Testimony of Mrs. J. L. Freck.)

Q. At that time. And what were you doing there? Who was with you?

A. We had had a social evening of playing cards for a few hours anyway.

Q. And you were playing bridge there in that coach? A. Yes, sir.

Q. And who was playing at the table with you?

A. Mrs. Cheney was at the table opposite me, and I believe Mr. Cheney was at the side of her, if I remember correctly.

Q. And who was the fourth member of the party?

A. Mr. Freck was in the seat I believe opposite him, or else it was the other way; I couldn't say for sure.

Q. Now, will you state, Mrs. Freck, whether after this person stopped and said that a Sir Knight had fallen from the train—state what, if anything, you did immediately thereafter, after that was said?

A. Well, the men folks immediately rushed, and we women folks as fast as we could follow.

Q. And how soon did you rush out yourself after this announcement had been made?

A. Right immediately.

Q. Just a matter of a few seconds, was it?

A. It wasn't so long a time. I wouldn't say how long a time; it didn't take very long, because were only out—it was at the back end of the second coach, you see, and we only had a few steps to go to the opening, or to the hallway, or whatever you call it, vestibule, I guess they call it; the regular [87—47] trainmen do.

Q. State whether or not the train was still in

(Testimony of Mrs. J. L. Freck.)

motion when you went back there immediately after this announcement.

A. The train was still in motion, I am sure.

Q. And about how fast was it going?

A. That I couldn't say; just ordinary speed, I guess.

Q. When you went back there after this announcement, state whether or not the train had arrived at Saco as yet, at this station or siding?

A. Well, it was dark, I couldn't say as to that; but I am quite sure the train was in motion, and I believe we were on the side track, but not yet at the station, as the train was still moving, and if it had been at the station and in the clear, I think we would have been at a standstill, which we were not.

Q. Was the train at any time, as far as you know, stopped after the accident occurred, until the time when it finally stopped there at Saco to allow the other train to pass it?

A. I think not. I am quite certain that it was in continuous motion all the time.

Q. As far as you know, there was no emergency stop made at any time by the train after Mr. Shellenbarger fell from it? A. I think not.

Q. Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?

(Testimony of Mrs. J. L. Freck.)

Mr. ROCKWOOD.—I object to that, your Honor, because [88—48] there is nothing to show that the condition at that time was the same as at the time of the accident.

COURT.—I think she can testify.

A. Want me to answer the question?

COURT.—Yes.

Mr. ROCKWOOD.—Save an exception.

A. When we rushed out into this vestibule the men folks were first, and I was right after them, and the trap was open, and the door was open.

Q. And on which side? On which side of the vestibule was the opening with respect to the direction the train was going?

A. Well, as far as my sense of direction is concerned, I think it was on the left side.

Q. If a person were passing from the observation-car to go into this coach that you had been playing cards in—if they were undertaking to pass from the observation-car to go up towards the engine, this vestibule door that you speak of as being open, would be on that person's right or left hand side?

A. Going straight east as we were going, I would say that that vestibule was on the left-hand side.

Q. And now then, I wish you would state to the jury whether or not prior to this announcement being made that a Sir Knight had fallen from the train—state whether or not there was anything unusual that you observed in the movement of the train.

(Testimony of Mrs. J. L. Freck.)

A. Just a few seconds before the announcement was made there was a very sudden, and I would say rather violent lurch. I was sitting with my back to the engine, and in attempting to describe the lurch, it would throw me backward like this, and the party in front of me was suddenly pushed forward against [89—49] the table; we had a card-table between us.

Q. And Mrs. Cheney was sitting opposite you?

A. Yes.

Q. At the table?

A. Yes, we were on the inside next to the windows, and she was opposite me.

Q. As Mrs. Cheney was riding she was facing in the direction the train was going, as I understand you? A. Yes, sir.

Q. What effect, if any, did this sudden lurch of the train have upon Mrs. Cheney, and have upon yourself? A. Well, she said at the time—

Mr. ROCKWOOD.—Just a moment.

Q. Not what she said, but what you observed, if anything, in her movements, or what effect it had upon her from what you saw. Not what she said, but what you may have seen.

A. Well, she was rather disturbed.

Q. And you were all seated at the table at the time this occurred? A. Yes, sir.

Q. Now, in what way was she disturbed? That is rather a general term. These gentlemen here they want to know what sort of lurch of the train it was, if there was one. How much did it disturb her?

A. She was thrown forward this way against the

(Testimony of Mrs. J. L. Freck.)

edge of the table, and I would say that she was made rather uncomfortable from feeling the edge of the table against her abdomen, at least she mentioned it at the time—I wasn't supposed to say that.

Q. What would you say, Mrs. Freck, as to whether or not this [90—50] lurch of the train which you have described—state whether or not that was just an ordinary lurch or swaying of the train that might ordinarily occur in the ordinary operation of it, or whether it was an extraordinary and more violent jerk?

A. Well, I would say it would be in the nature of a jerk or lurch similar to when you are riding in a car and you are stopped suddenly, or attempt to stop suddenly.

Q. Mrs. Freck, just answer my question if you can, as to whether or not it was just the ordinary swaying of the train, or an extraordinary lurching of it?

A. It was not the ordinary swaying of the train, it was a lurch forward.

Q. Had you seen Mr. Shellenbarger during the evening prior to this occurrence, had you seen him about the train? A. I had.

Q. And was he in good spirits as far as you observed? A. I should say he was.

Q. And appeared to be about the same as you had known him in your previous years of acquaintance with him? A. I should say so.

(Testimony of Mrs. J. L. Freck.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

This was the car in which you were riding—

Mr. DIBBLE.—Pardon me just one moment, if you please. I did overlook to ask one thing, Mr. Rockwood. Now, you have spoken of the lurch of the car, as you have described it there. State whether or not there was any other sudden stopping of the train that you were conscious of, following that lurch that you have spoken of; if there was a second lurch? [91—51]

A. There was no sudden stop, but there was another sudden jerk.

Mr. DIBBLE.—There was. How long was that after this first jerk that you have mentioned?

A. That jerk I would say was very shortly after.

Mr. DIBBLE.—That would be as you got nearer to Saco to make the stop there, would it, that second one lurching?

A. I presume so.

Q. (Mr. ROCKWOOD.) This car, Mrs. Freck, that you was riding in, was the first Pullman car ahead of the observation car. Is that correct?

A. That is the car we were in.

Q. The one you were riding in at the time?

A. At that time, at the time the announcement was made.

Q. And that car, do you recall the general nature of that car? Was it a solid compartment car, or were there open berths in that car?

A. Well, to tell you the truth, I don't remember.

(Testimony of Mrs. J. L. Freck.)

Q. Do you remember whether the state*ment* or compartment in which you were riding at that time, was on the north side of the train, or the south side of the train, as it was running east?

A. Well, I don't recall.

COURT.—Was it the right or left hand side of the car?

A. To the right or left?

COURT.—As you were going.

A. Going east—well, going east, if I am not mistaken. I think the compartments of that coach were on the south side.

COURT.—On the right-hand side?

A. I am not sure, but I think they were; it seems to me the [92—52] passageway was on the left side.

Q. Was on the north side, that is, the left-hand side of the train, the passageway? The same side of the train with this vestibule that you are talking about? A. I think so.

Q. So that when you got up to go—

A. So long ago, I can't remember.

Q. So when you got up out of your seat, when this gentleman made the announcement, you went towards the north or left-hand side of the train, and into the hallway, and turned to go towards the rear of the train. Is that right?

A. How did you say that?

Q. When you got up out of your seat to go towards the vestibule, you went towards the passageway on the north or left-hand side of the train and

(Testimony of Mrs. J. L. Freck.)

then turned and went back towards the rear of the train?

A. I don't think we went—as I remember it, their apartment was in the end of that coach, and we didn't have very far to go, we just had to go that step right out of their doorway into the little hall, and then almost straight ahead. We didn't have to turn around very much. Was back a little bit, you see.

Q. Let me get it. Here you stand in the door?

A. Yes.

Q. You had gotten up out of your seat and walked towards the door, which is a step?

A. Yes, sir.

Q. Then you turned towards your left and right into the passageway back towards the rear of the train? A. Yes, sir. [93—53]

Q. That is the way it worked, wasn't it?

A. If I get you right, that is the way it was.

Q. And you say that the first jerk, the one that bumped Mrs. Cheney, came just a few seconds before you heard from this man that somebody had fallen overboard?

A. That is what I would say.

Q. And then some time later there was a second jerk. Now that second jerk, did that come before or after you got out of the compartment?

A. Before.

Q. Before you got out of the compartment?

A. Yes.

(Testimony of Mrs. J. L. Freck.)

Q. So there was jerk; in a few seconds a man came— A. It was right after that.

Q. Right afterwards. Somebody said a man had fallen off? A. Yes.

Q. And in another few seconds there was another jerk, before you had time to get out of the room?

A. Yes, before he even had time to get out.

Q. Before he left the door. Is that right?

A. I think he was in the doorway, or at the end of the hall there some place.

Q. You don't recall who that man was?

A. No, I don't; I didn't know the men very well.

Q. Mr. Cornell was talking about a stop of the train between the time he jumped off and between the time it stopped on the passing track at Saco. You don't remember any such stop, do you?

A. No, I don't.

Q. So the only stop that you recall is the stop at the [94—54] station, when you were on the side track?

A. That is the only one I can recall as a full stop. I think at the second jerk, or second slowing down, was almost a stop, but I wouldn't say it was.

Q. Did you get off the train? A. No, I did not.

Witness excused. [95—55]

TESTIMONY OF CHARLES KAUFMAN, FOR PLAINTIFF.

CHARLES KAUFMAN, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

(Testimony of Charles Kaufman.)

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Kaufman, where do you live?

A. 28 East 44th Street, Portland.

Q. And what is your business?

A. I am in the postoffice, as a clerk.

Q. How long have you been in the postal service? A. I am in my twenty-second year now.

Q. Twenty-two years in the service?

A. Yes, sir.

Q. Right here at Portland? A. Yes, sir.

Q. Do you know Mr. Shellenbarger? A. I do.

Q. The plaintiff in this action? A. I do.

Q. How long have you know him?

A. Ever since I have been in the service.

Q. And for how long a time would you say you had worked for him prior to his injury, which the testimony shows occurred on the 12th of July, 1928—the 13th of July, I should say, rather?

A. About fourteen or fifteen years.

Q. You have worked with him in the service?

A. Yes, sir.

Q. And state what his capacity for work was during those years [96—56] that you knew him, prior to this injury he received?

A. Why, he was perfect.

COURT.—He was perfect?

A. Yes, sir.

Mr. ROCKWOOD.—That is a pretty strong statement.

(Testimony of Charles Kaufman.)

COURT.—You will have to speak louder. He says he was perfect.

Q. In his capacity to work? A. Yes, sir.

Q. Was he superintendent at that time of his station?

A. Well, he had various jobs since I knew him, but the fourteen years I worked for him, he was superintendent of his station.

Q. He was superintendent?

A. He was superintendent of his station.

Q. During those fourteen years? A. Yes, sir.

Q. And do you recall his return to work at the station, I think in April, 1929?

A. What is it you say?

Q. Were you working there at the station when he returned to work? A. Yes, sir.

Q. What was his condition then when he returned to work, and what is his condition now, as you have observed it?

A. Well, prior to his coming back to work the superintendent at the station requested me to help carry him part, because he wanted to come back to work, and so us boys—rather we would help him in every way we could, on account of his inability to concentrate and come in and— [97—57]

Mr. ROCKWOOD.—Just a moment; please don't repeat the conversation you had with your superior.

COURT.—Counsel asked what his condition was after he came back.

Mr. ROCKWOOD.—Just this man's observation.

A. Poor; I should say poor.

(Testimony of Charles Kaufman.)

Q. We can't hear you, Mr. Kaufman.

A. Poor; I would say poor.

COURT.—What do you mean by "poor?"

A. Well, he dragged his feet, and he couldn't remember, and similar things like that.

Q. State whether or not prior to this accident you would take up with him matters pertaining to the department, for advice, etc.

A. Yes, sir, and not only us, but superintendents of other stations would occasionally call up for technical information, things he knew.

Q. How has it been since this accident; since he returned to work do you apply to him the same way?

A. No, sir, none of the boys that work for him go back to him for information.

Q. Why don't they?

A. Because he hasn't got it in him any more, he doesn't know it, he has lost it.

Q. What is his condition as to being nervous, or otherwise?

A. Why, absolutely nervous as could be. I seen him have to close the window and ask for relief because he was so nervous he couldn't go ahead when the work was rushed.

Q. Have you noticed anything about his condition of memory?

A. Oh, lots of times. One instance, I seen lots of instances, [98—58] but this is one where, for instance, the telephone bell rings, and at the time the telephone rings he was listing up his money orders.

(Testimony of Charles Kaufman.)

He goes and answers the telephone, and then perhaps someone on the telephone wants to know whether we carry so many thousand envelopes, or something, on hand; if not, they would go to the main office. So he would go over to the stamp clerk and ask the stamp clerk whether or not he carried that much. By the time he went back and answered the telephone he would forget all about the work he was doing, and go about something else, and leave his work lying there. For instance, I seen where he answered the telephone and went over to one of the boys to find out some information, and on his way back another one asked him about Saturday time off, and instead of going back and answering the telephone he just went about his business like nobody ever—left the receiver down. And another thing is, I have seen him enclose the wrong enclosure in the wrong envelope, lots of time since he come back.

Q. Well, from the condition which you observed him in, from the time he has returned to work since this accident, what would you say as to whether or not he is able and really should be working or not? A. He should not.

Mr. ROCKWOOD.—Just a moment. I object to that as calling for a conclusion of a lay witness.

COURT.—Let him describe his condition, and let the jury say that.

Mr. DIBBLE.—Yes, I think that is probably true.

Q. State whether or not you have observed anything in his [99—59] appearance there while at

(Testimony of Charles Kaufman.)

the station, indicating any pain or suffering on his part?

A. I have seen him lay down on the—lay his hand on the desk and hold his head, time and time and time again; although never complaining to me, I knew well enough that the man was so sick he shouldn't have been working; and on several occasions I went over and pulled his window down to be able to do part of his work as long as I wasn't too crowded, so as to give him a chance to rest his head.

Q. Has he complained of any headache, or things of that sort?

A. Yes, he has complained to me had a headache.

Q. How does he seem to get along, does he seem to be getting any better?

A. No, sir, on the contrary, I think.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

But since he has come back—when did he come back, after the accident, do you recall?

A. What month, you mean?

Q. Yes. A. I think it was in April.

Q. What?

A. I think it was in April, if I remember right.

Q. But you are not sure of that time?

A. No, sir.

Q. It was some time in the spring of 1929?

A. Yes, sir.

Q. Or late winter?

(Testimony of Charles Kaufman.)

A. No, it was early in the year, because it was after the holiday rush. [100—60]

Q. I say, in the late winter, or spring, of 1929?

Mr. DIBBLE.—It wasn't late winter, because it was after the holidays.

A. It was early in the year; wasn't fall; wasn't late in the year, was early in the year.

Q. You don't understand. I say, late in the winter or early in the spring of 1929? A. Yes.

Q. And since he has come back he has been fairly regular on the job, hasn't he?

A. He has, yes, sir.

Q. And as far as you know there hasn't been any absences from the work because of inability to work? A. No, sir.

Witness excused. [101—61]

TESTIMONY OF W. G. SHELLENBARGER, IN HIS OWN BEHALF.

W. G. SHELLENBARGER, the plaintiff, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

You are the plaintiff in this action?

A. I am.

Q. And what year did you come to Oregon?

A. 1893.

Q. And have you been living in Oregon ever since? A. I have.

(Testimony of W. G. Shellenbarger.)

Q. And what has been your capacity, so far in your lifetime, during the last, say fifteen or twenty years?

A. Well, I been working with the postoffice; the last fifteen years I have been in charge of the station on Oak Street.

Q. And where is the station located that you are now employed at?

A. Near Third Street, on Oak.

Q. Near Third and Oak. And state whether or not you have held any positions in Masonry, which require you to do what we call ritualistic work, memory work? A. I have.

Q. And what positions in the Fraternity have you held of that character?

A. Well, most every position in the Fraternity, from the lowest to the highest in the state.

Q. Were you ever Worshipful Master of your own Blue Lodge? A. Yes, twice.

Q. What Lodge is that? [102—62]

A. Washington 46.

Q. How many times have you been its Master?

A. Twice.

Q. State whether or not you have ever been Worshipful Master of the State of Oregon.

Mr. ROCKWOOD.—I don't think that is very material, if your Honor please.

COURT.—I don't think it is necessary to go into that.

Q. No, but this work you spoke of has required memory work on your part, has it?

(Testimony of W. G. Shellenbarger.)

A. Yes, it has.

Q. And at the time you were on the train you were, of course, going to attend this conclave of the Knight Templars at Detroit, Michigan?

A. Yes.

Q. Is that true, and since the accident which befell you, state to the jury what has been your ability to do this ritualistic work, this memory work?

A. Well, I can't do it at all, I can't do anything of that kind.

Q. Why? A. Because I can't remember.

Q. Now, the train that you left on, left from Portland, Oregon, did it? A. Yes, sir.

Q. And this accident to you occurred about what time, as near as you can say, in the evening?

A. About ten-thirty, or a quarter to eleven.

Q. What part of the train did you have your berth in, or your sleeping place?

A. Why, I think I was in about the third or fourth car from [103—63] the rear.

Q. There was an observation-car on the rear of the train? A. Yes, sir.

Q. As has been testified here, and your sleeper was some cars ahead of that, towards the engine. Is that true? A. Yes, sir.

Q. Now, during the day of the 12th of July, after you left Portland, during that day of the 12th of July, 1928, and during the evening of that day, and during the 13th of July, 1928, up to the time that you met with the accident, state whether or not you

(Testimony of W. G. Shellenbarger.)

had occasion to go back and forth through the train? A. I didn't get that question.

COURT.—After you left Portland, and before the time of the accident, did you have occasion to go back and forth through the train?

A. Oh, yes.

Q. And it is admitted this was a vestibule train. I want to ask you if at any time while you were riding on the train, up to the time you were injured, were the vestibules ever open except at stations? A. No.

Mr. ROCKWOOD.—I object to the form of that question; ask whether he saw any.

Q. Well, did you ever see any time when you were not at stations discharging passengers, when they left the vestibule doors open between the cars?

A. Only except at stations.

Q. Only except at stations. And you passed back and forth through the train on the 12th and 13th of July, 1928, before the accident happened, just as your convenience required, did you? [104—64]

A. Yes, sir.

Q. You had no difficulty of any sort? A. No.

Q. No accident, or anything of that kind. Now, I want to ask you, Mr. Shellenbarger, generally about your condition of health before this accident occurred. Have you had any sickness to speak of in your lifetime, before receiving these injuries? If so, tell the jury what that has been.

A. No, I never had any sickness of any duration; perhaps a toothache, or something of that kind, for

(Testimony of W. G. Shellenbarger.)

a day or two; but nothing that would confine me to bed for any length of time.

Q. You had the whooping-cough? A. Yes, sir.

Q. And have you had the measles?

A. Yes, as a child.

Q. Did you ever sustain a fracture to one of your legs? A. Yes, sir.

Q. How old were you when that happened?

A. About thirteen.

Q. And which leg was that? A. My right.

Q. Aside from these matters that I have called your attention to, have you had any sickness or incapacity of any sort? A. No.

Q. And this injury to your leg which you received when you were thirteen, and you are now how old —how old are you? A. About sixty-three.

Q. Has that affected you in any way since receiving it? A. No.

Q. Recovered from that, have you? A. Yes. [105—65]

Q. Now just ahead, if you will, and briefly tell the Court and jury all that you remember concerning the happening of this accident, up to the time that you were thrown from the train—just briefly. Maybe I might ask you this question: Where had you been? In what part of the train had you been before you met with the accident?

A. I was in the observation-car.

Q. And while you were in there what were you doing?

A. Oh, just to have a little—spending the time

(Testimony of W. G. Shellenbarger.)

socially with some of the men, talking with some of them; it wasn't bedtime yet. I had no chance to walk around or exercise except through the train, and I was back there, and we had been talking about various things.

Q. About how long had you been back in the observation-car, as distinguished from your own coach, before the accident happened?

A. Oh, I should judge twenty minutes to half an hour.

Q. And where were you going, if any place, or what were you undertaking to do at the time the accident happened?

A. I was going back to go to bed, retire for the night.

Q. And just go ahead and tell what happened to you.

A. Well, I started back through the observation-car. I was sitting back pretty well to the rear of the car; there were some others there, and we had been talking, and I got up and started; I think some had—one or two had maybe gone ahead; I don't remember about that. I went—started back, and I noticed the usual swaying of the train; of course I had to be careful about that; then before I got to the—between the cars—I can't think. [106—66]

COURT.—Vestibule? Door?

A. Vestibule. I noticed that there seemed to be more than the usual amount of movement to the train, but I went on. I thought well, it is only mo-

(Testimony of W. G. Shellenbarger.)

mentarily, and when I got in between the cars, passing through the vestibule, and went to go to the next coach, why, there was a lurch, a sudden lurch of the train that threw me. I lunged forward. I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember.

Q. What is the last thing you remember before the accident?

A. I was going through space. Practically that is the only way I can express it.

Q. And you were going toward *to* your coach to retire. Which side of the train were you thrown on? Which way were you thrown?

A. I think I was thrown towards the left side.

Q. Now, then, state whether or not you had any notice or warning from anybody that there was an open vestibule on that coach that you were seeking to enter.

A. No, I didn't see anybody there, and I didn't hear anybody. I didn't hear anybody say anything.

Q. Was there any barrier of any kind there?

A. No.

Q. Was there any light of any sort there; any

(Testimony of W. G. Shellenbarger.)

red lantern [107—67] on the platform floor, to indicate there was danger on that side of the train?

A. No, I didn't notice anything of that kind.

Q. Did you notice anything there except the ordinary lights of the vestibule?

A. Just the ordinary passage between the cars.

Q. As you were undertaking to pass between the cars, did you know that—if it turns out to be a fact, as they say it is now—did you know at that time that this vestibule door on the left was open?

A. No.

Q. And now as you passed from the back end of the observation-car, making your way forward to the front of that, and from there on to the next platform, you say that there was the ordinary swaying of the train? A. Yes, sir.

Q. But that didn't—did that throw you down or injure you in any manner? A. No.

Q. And then when you were passing on to the platform of the rear of this coach, then this other lurch of the car that you are speaking of?

A. Yes.

Q. Now then, just tell the jury, Mr. Shellenbarger, how that lurch that occurred there compared with this swaying that you have been speaking of, that you noticed as you were walking up through the observation-car; was it the same kind of a lurch?

A. No. Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of [108—68] the car was such that

(Testimony of W. G. Shellenbarger.)

you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronegr —well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time.

Q. Will you state to the jury where you were as far as you know when you came to, after the accident.

A. Well, I was in a hospital of some kind, hospital bed, or I don't know whether was in bed or on a stretcher or what; some kind of piece of furniture to lie down on anyway, and they seemed to be pulling at my clothes or something, and that is the first I remember. I asked them what was the matter but they said—the doctor told me to keep still, never mind, they would tell me later, and he wouldn't explain anything, and I wasn't—I didn't know very much anyway. I didn't seem to understand where I was or why I got there. He says, "We will tell you about it later." And that was along in the afternoon, I should judge, of the day after. I know—I didn't feel fully myself. I couldn't think of things or know what had happened, or anything until some time the next day. After the night had passed, the doctor came, and I seemed to be in much better condition, and so he told me what had happened. I asked him if anybody else was hurt, and he said no, that I went off the train by myself; that I was thrown off the train.

Q. Have you since learned what this place is, the name of it? A. Where this hospital was?

(Testimony of W. G. Shellenbarger.)

Q. Yes.

A. Yes. It is—I can't think of it now. [109—69]

Q. Well, it is admitted here; we will help you out on that. It is admitted it was Glasgow, Montana.

A. Yes, Glasgow, that is the name.

Q. Do you know about how long you were confined there? A. I think about nearly two weeks.

Q. State to the jury whether or not you experienced any pain or suffering while you were there at this hospital at Glasgow, and if so, what it was.

A. I certainly did; I was in pain—well, had very severe pain in my head, my shoulders and my neck and my arms. I didn't have much—I didn't feel any in my lower extremities; they didn't seem to bother me any, but especially my head gave me lots of trouble. I couldn't move without pain.

Q. Do you know whether or not you had any black and blue marks on you, or did you observe that?

A. No, I couldn't look around over my body very much. They told me that there was some place on the head that was cut, but I couldn't see that, or couldn't say anything like what it was like.

Q. Now, from the hospital there at Glasgow where were you taken?

A. Taken to the train and from there brought to Portland, Good Samaritan Hospital.

Q. Do you recall or remember whether or not Dr. McDaniel, Dr. E. D. McDaniel, met you at the train, or do you recall that? A. He did.

(Testimony of W. G. Shellenbarger.)

Q. Do you know how he came to be there, as to whether arrangements had been made for that or not? [110—70]

A. Mr. Cheney, who was bringing me back, told me that he had wired ahead for Dr. McDaniel, to meet me with an ambulance at the train.

Q. Dr. McDaniel was there and helped you to get to the hospital? How long were you confined to the hospital? A. About six or seven weeks.

Q. And did you incur any hospital expense there? A. I did.

Q. How much was the bill there at the hospital?

A. Was about seven hundred dollars.

Q. Has that bill been paid by you?

A. Yes, sir.

Q. I beg pardon.

A. Yes, sir, I say the bill was taken care of, by—

Mr. ROCKWOOD.—It is immaterial, I think, how; the fact is he paid it.

COURT.—It has been paid.

Q. Now then, let me ask you this: Do you know whether or not any X-ray pictures were taken of you at this hospital at Glasgow, Montana.

A. Not during my consciousness.

Q. As far as you know, no pictures were ever taken of you?

A. I don't think they had any facilities; I think they told me that.

Q. Who was the physician that waited on you there; do you remember his name?

A. I think that I would know it if I heard it, but I can't recall it now.

(Testimony of W. G. Shellenbarger.)

Q. After you came to the hospital here, the Good Samaritan, do you know whether or not any X-ray pictures were taken of you? [111—71]

A. They were.

Q. Who were they taken by, and under whose direction?

A. I think under the direction of Dr. McDaniel. As I understand it, by the hospital facilities there.

Q. Now then, during your stay at the Good Samaritan Hospital there, did you experience any pain? Or suffering? A. Yes, I did.

Q. And of what nature was that?

A. Why the same trouble as troubled me in the hospital in Montana, pain in my head and neck and shoulders. I had to lie entirely on my back; couldn't lie on my side.

Q. Do you know how long you were confined to bed at the Good Samaritan?

A. I think about a month.

Q. And after that, do you know whether you were placed in a wheel-chair, or not?

A. Yes, the nurses used to put me in a wheel-chair and put me out, if the weather was nice; outside. First, just around the hall, and later if the weather was nice outside in the open air.

Q. What was your condition of health prior to receiving these injuries, as to your being nervous or otherwise? A. What was that question?

Q. What was your condition of health prior to receiving these injuries, as far as your nervous system was concerned—your nervousness?

(Testimony of W. G. Shellenbarger.)

A. I never was nervous before.

Q. Did you have any difficulty bearing or doing your work before this? A. No. [112—72]

Q. When did you finally go back to work at the station? A. I think it was about April 1st, 1929.

Q. April 1st, 1929?

A. About that time. I couldn't say definitely.

Q. From July 31st, 1928, then, until the first of April, 1929, did you do any work, earn any wages?

A. What was that?

Q. From July 13th, 1928, to April 1st, 1929, did you work at anything and earn any wages?

A. No.

Q. What were you receiving as wages from the government at the time you were injured?

A. Twenty-six hundred dollars a year .

Q. Is that paid out in monthly payments or is it paid in annual payment?

A. No, semi-monthly.

Q. Twenty-six hundred dollars for twelve months? A. Yes, sir.

Q. And then you lost in wages at that rate whatever that figures up to? A. Yes, sir.

Q. July 13, 1928 to July 1, 1929—or April 1st, I should say, 1929. Now since you have returned there to the station, since April 1st, 1929, how have you been able to perform your work and duties there? Tell the jury what your condition is now with respect to the doing of your work.

A. Well, I talked the thing over with the postmaster, and I told him—

(Testimony of W. G. Shellenbarger.)

Q. You wouldn't have a right to say the conversation; you couldn't be allowed to tell that. Let me ask you this [113—73] question: Do you have any difficulty or inconvenience in doing this work now? A. Yes, sir.

Q. Just tell the jury what the trouble is, if there is any? What is the difference between your situation now and what it was before you met with this accident?

A. It is pretty hard for me to tell the difference between now, and what it was before, but I can't think of things; I can't recall; I can't—if I undertake to read anything, any instructions, I have to read it over three or four times, and then I don't seem to be able to comprehend it, and I can't remember it. I am called—lots of times, I have to go to the phone and wait on the phone, answer the phone, and people want information. I have got to give them—supposed to give them that information; I can't; lots of times without it is something very simple and no change, why I can't give it to them. Have to ask some of the other clerks for rates or such things as that. It seems that I can remember things as they were, but things that have changed, I don't seem to be able to make those changes. Anything that was like it was before this accident happened I seem to be able to comprehend that pretty well, but I can't—where things have changed, I am at sea. It is pretty hard to make anyone understand that condition without they have gone through it or studied it some, and know what the actual conditions are.

(Testimony of W. G. Shellenbarger.)

Q. You spoke about your neck and back there, pointing up to the base of your head there; what was the trouble you experienced there?

A. Well, just a pain at the back of my head, that is where [114—74] my head joins. If I turned my head any at all, I would have pain. Of course now I have got so I can turn my head but I can't rest it. When I lie down at night I always have to prop my face to keep it steady so I won't lie over on one side and cause a strain on that joint, I guess it is.

Q. Do you suffer any from any pain at this time?

A. Oh, yes.

Q. What is the nature of that?

A. Well, I have—I don't know; I don't call it a headache. I call it a hurt; it seems to me more like a hurt than a pain in my head, the back part of my head, and I have practically headaches all the time too; in addition to that I have this extra pain or hurt that comes at the top of my head where it is fractured there.

Q. And how do you seem to get along, Mr. Shellenbarger—are you getting any better, or how do you feel?

A. Well, I don't like to say that I ain't getting any better but I ain't improving like I should. I know that I shouldn't be doing any work at all; that is the way I feel; that is the way my—anything that takes responsibility on me, I shouldn't take it. I have to ask the clerks that are there associated with me; I call on them lots of times for help and assistance to do my work that I ain't able to do,

(Testimony of W. G. Shellenbarger.)

and they have been very good and helped me out if I get in tight places or difficulties that I can't straighten out myself.

Q. It is mentioned here in the complaint that your hearing has been impaired; have you noticed any change in that respect?

A. Yes, I have. I have difficulty in hearing, especially if there is some other noise. Now a noise outside seems to break in on anything that anybody is saying. I don't seem [115—75] to be able to get two things at the same time.

Q. Have you experienced any difficulty with respect to walking, or about your gait,—is it different from what it was before?

A. Oh, yes, I ain't able to get around near as readily as I used to; was always active, have been all my life, but I can't be active now. I have to be careful where I go, and how I go.

Q. What effect, if any, have these injuries had upon your stepping up? Suppose you are walking along the street down here and want to step up on to the curb or step up here on this witness-stand?

A. Generally when I am thinking about what I am doing, I generally figure that I have to have about two inches more than I ordinarily have to clear. If I go to step on the curb, I will try to step about two inches higher than I would ordinarily; that is about the only way I can express it. Lots of times my mind ain't on just what I am doing and where I am going and I will strike and stumble down.

(Testimony of W. G. Shellenbarger.)

Q. Did you have anything like that before this occurrence? A. No.

Q. Now, mention is made here of your eye-glasses. Did you have your glasses on at the time the accident occurred? A. Yes.

Q. And were they damaged or broken in any way?

A. The surface, the face of them was scratched.

Q. Did you spend any money for repairing them?

A. Yes, sir.

Q. How much did you spend for that, do you remember? A. I think it was thirty dollars. [116—76]

Q. And since you have come from the hospital, the Good Samaritan Hospital, have you had any medical attention? Are you receiving any now?

A. Yes, sir.

Q. And who has been waiting upon you?

A. What is that?

Q. Who has been attending you? Who has been waiting upon you?

A. I have gone to Dr. McDaniel. Went to him perhaps once a week for quite a while after I got out of the hospital, and I have also been to Dr. McCorkle.

Q. Dr. M. G. McCorkle? A. Yes, sir.

Q. And you have been receiving treatment from him, have you? A. Yes, sir.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Do you remember, Mr. Shellenbarger, what berth you had in the car?

(Testimony of W. G. Shellenbarger.)

A. I don't remember the number; I think it was about—it was close to the end, possibly the end.

Q. One of the lower numbered berths?

A. Yes. Well, I don't know whether it was one or eight, but it was a lower berth, and I think at the end of the car.

Q. Now, just what is the last thing you remember before you came to in the hospital at Glasgow?

A. Well, the last thing I remember I seemed to be falling through the air.

Q. Do you remember when you were in this act of falling that you refer to, did you see any man around you or close to you? A. No.

Q. So you don't know whether there was a brakeman in the [117—77] vestibule at the time or not?

A. Well, if there was any in there, I didn't know; I didn't see him.

Q. When you went forward do you know whether or not you threw your hands up?

A. Well, I imagine I would naturally—

Q. I am not asking what you naturally did, but do you remember?

A. No, I don't remember.

Q. When this lurch that you describe occurred you were walking straight forward towards the front end of the train; is that correct?

A. Yes, sir.

Q. Now was that a lurch which the sudden stopping of the train would make, do you remember?

A. Well, I couldn't say that; that is my impression, that it would be a sudden stop of the train.

(Testimony of W. G. Shellenbarger.)

*O*t might have been—I think the speed was changed, —that is, I have got that impression some way, the speed was changed, and it would indicate to me that it was a stoppage, movement to stop the train.

Q. Now you say you were unconscious for a while over in the Glasgow hospital; you had apparently been there too for some time before you came to, and then you said on direct examination, I think, that you didn't feel yourself until the next day, after the night had passed; now, does that mean the day immediately following the accident, which would be the 14th, or do you mean the day after that, the 15th, after you had had a full night's sleep in the hospital?

A. The 15th; Sunday, I think it was.

Q. And on the 15th, you then felt yourself; you felt more nearly [118—78] normal; you were conscious?

A. Well, I was conscious, yes. From that time on I remember things that—that is I could—I knew what people were doing.

Q. You knew what people were doing, and you were capable then of talking to people?

A. Yes, sir.

Q. And in your talk you were capable then of making an intelligent statement; you were out of your unconsciousness? A. Yes.

Q. Do you know a gentlemen here in Portland by the name of Mr. Grutze? A. Yes, sir.

Q. Mr. Grutze of the Title & Trust Company?

A. Yes, sir.

(Testimony of W. G. Shellenbarger.)

Q. Were you ever in my office accompanied by Mr. Grutze? A. Yes.

Q. Do you remember when that occurred?

A. No, I couldn't tell the date.

Q. But it was the latter part of May or early in June of the year 1930, some few weeks before this action was actually started; that is correct, is it?

A. Yes, along in the spring, I think, of the year some time.

Q. And at that time you described and talked about how this accident happened, didn't you?

A. Yes, sir.

Q. At that time did you state in words substantially as follows, in the presence of Mr. Grutze and myself, that you had no recollection of how the accident happened, and that the last you knew was while you were inside of a car until you came to in Glasgow? [119—79]

A. I don't remember making any statement of that kind.

Q. Well, if that statement was—if you did make that statement was that a correct statement of fact at that time?

A. That would be a general statement, yes.

Q. Now you were examined, were you not, by Dr. Pease at the request of the defendant. That examination took place ten days ago here in Portland? A. Yes, sir.

Q. And at that time did you say to Dr. Pease substantially: "I was in a car aisle, and the next thing I knew I was in a hospital at Glasgow."

(Testimony of W. G. Shellenbarger.)

A. I don't remember saying anything of that kind. I may have said that.

Q. If you said that was that a correct statement of fact?

A. Well, partly; it might be partly. It wasn't a false statement but might not explain things fully.

Q. Well, wherein was that incorrect? "I was in a car aisle, and the next thing I knew I was in a hospital at Glasgow."

A. Well, I perhaps didn't state what had happened there in the aisle.

Q. Mr. Shellenbarger, I take it that you have admitted that you made a statement in the presence of Mr. Grutze and myself last spring substantially as I quoted it, that you remembered nothing from the time you were in the car until you came to in Glasgow, Montana. Did you say that?

A. I don't know that I got your question. That don't cover all the time.

Q. I am trying to find out whether that statement you made in May or June of 1930, in my office was a correct statement of fact; were you telling the truth then? [120—80]

A. Well, I certainly told the truth; I never told anything else.

Q. I assume that, of course; and when you were talking to Dr. Pease here, ten days ago, and when you said, of you did say it, "I was in a car aisle, and the next thing I knew I came to in a hospital at Glasgow"—if you said that it was your intention to tell the truth at that time too, was it not?

(Testimony of W. G. Shellenbarger.)

A. Yes.

Q. On the 15th of July, 1928, that is two days after the accident happened, or approximately two days after the accident happened, you were still in bed, were you not? A. Yes.

Q. I show you a statement or written sheet dated Glasgow, Montana, July 15, 1928, and at the bottom written in "W. G. Shellenbarger." Did you sign that?

Mr. DIBBLE.—Just a moment, let me look at that.

Mr. ROCKWOOD.—I am not asking for the contents. I just want to identify his signature.

A. I don't know anything about it.

Q. Well, look at it, is that your signature?

A. Well, I couldn't say that it was; I wouldn't say that it wasn't.

Q. You don't know whether that is your signature or not? A. No, I couldn't.

Q. Do you remember being called on by some representative of the Great Northern Railway Company, who asked you as to the facts at that time?

A. No.

Q. You say that you had your glasses on at the time of the accident. How do you remember that? [121—81]

A. Well, I always wear my glasses. I never go without them.

Q. That is the only way that you are sure that you had your glasses on at that time—that you usually wore them? You have no recollection of

(Testimony of W. G. Shellenbarger.)

actually whether you had your glasses on or not, have you?

A. No, I have no recollection.

Q. For what difficulty in your eyes do you wear glasses?

A. Well, I can't see to read without the glasses, that is, I can't see good; I can read large print, and used to wear glasses, nose glasses; I found so much difficulty in them sliding and getting misplaced and the vision wrong, that I got a different style of glass and put them on, and wear them all the time.

Q. Is that near sightedness, or far sightedness, do you know? A. No, just old age, I guess.

Q. What is the effect of old age? You are not so very old at that. What is the effect of old age,—near sightedness, or far sightedness, do you know?

A. No.

Q. How long have you worn glasses regularly?

A. About ten years, twelve years, something like that.

Q. And during that period your vision has been such that you wear glasses constantly?

A. Yes, sir.

Q. For reading and for all your other activities, while you are walking on the street, and everything?

A. I have bifocal glasses for that reason, so I can see at a distance, and at the same time use them for reading.

Q. You said on direct examination that before you came to the vestibule you noticed the swaying of the car as usual. Now, then, [122—82] will you tell us what the nature of that swaying was?

(Testimony of W. G. Shellenbarger.)

Was it a rocking of the train from side to side, or was it a jerking of the train by the change of speed?

A. No, it seemed to be a movement from side to side. I don't know that I stated more than usual. It was just about the usual movement of the train that you find. I noticed that.

Q. How were the lights that were in the vestibule, the lights in the ceiling?

A. I couldn't say about that.

Q. Then when you remarked a minute ago that there were, you couldn't recall to be sure?

A. No, I—

Q. On your direct examination you said there were the ordinary lights up above, but now you say you don't know whether there were or not?

A. I don't think I said that. I didn't understand it that way,

Q. The record will show what you said. But if you did say it—

COURT.—I think, if I recall, counsel assumed it in a question.

Q. Is that it? Maybe I am mistaken. The fact is, Mr. Shellenbarger, that you don't know whether the lights were burning in the vestibule or not?

A. I couldn't tell you, no.

Q. At any time immediately prior to the accident, or within a few minutes of the accident, were you talking to Mr. and Mrs. Meyer of Salem?

A. Yes, sir.

Q. In what car were they?

A. Well, I couldn't say; they were perhaps either one or two cars ahead of the observation; might

(Testimony of W. G. Shellenbarger.)

have been in the next [123—83] car, I couldn't say about that.

Q. Well, how long before the accident did that happen?

A. Well, that was perhaps half an hour.

Q, Within two or three minutes, or four or five minutes of the accident, you say you were not talking to Mr. and Mrs. Meyer? A. How is that?

Q. You had not talked to Mr. and Mrs. Meyer within three of four minutes of the time of the accident?

A. No, I had been talking to them, and went from their car on through to the observation-car, and after I had been in the observation-car some twenty minutes to half an hour, I was returning, to go to bed; and I talked to them on my way up.

Q. You talked to them on the way up?

A. On the way going to the observation-car.

Q. On your way back, before you started on the trip forward? A. Yes.

Q. As a matter of fact, Mr. Shellenbarger, whatever your condition has been since you went back to work about April, 1929, you have worked continuously at your former occupation, superintendent of the station? A. Yes, sir.

Q. And during this period, after your return to work, I assume that you have attended you Fraternal meetings with some regularity?

A. I have gone up occasionally; I don't go like I used to, of course.

(Testimony of W. G. Shellenbarger.)

Redirect Examination.

(Questions by Mr. DIBBLE.)

Just one or two questions, Mr. Shellenbarger. I omitted to ask you whether or not you have had any [124—84] dizzy spells of any kind since the happening of this accident? A. Yes, sir.

Q. What trouble have you had along that line?

A. Well, I have dizzy spells occasionally now; I notice more when I am lying down, kind of wavy dizzy spells; lot of times I feel it when I am walking. I am able to keep from falling down; I never have fallen down from them; but I notice that kind of whirling feeling.

Q. State whether or not there was any injury to your shoulder. I don't know whether I asked you concerning your shoulder or not. A. Yes.

Q. Which shoulder was injured?

A. My shoulder was injured.

Q. Which one was that?

A. I noticed pain on my shoulder, not very sharp pains, but I was lying mostly on my back, and after I got well enough to try and turn over, I couldn't lie on that side, and after—the next time I went to call on Dr. McDaniel I spoke to him about it, and asked him if he thought there could be any danger of any injury there. He says, "I don't think so," but he says, "You come up and I will make an X-ray and see." So some time after that I went up, and he had some X-rays taken, showing.

Q. Mr. Shellenbarger, counsel asked you about some conversation he says took place between you

(Testimony of W. G. Shellenbarger.)

and him and a Mr. Grutze. Where was that talk that you had with them? At whose office was that?

A. Dr. Rockwood's office.

Mr. ROCKWOOD.—Not doctor.

Mr. DIBBLE.—He is a doctor of laws. [125—85]

Mr. ROCKWOOD.—No, hardly that.

Q. Down in Mr. Rockwood's office, down at Carey & Kerr's, wasn't it? A. Yes.

Q. Railroad office, in the Yeon Building?

A. Yes.

Q. Did you have anybody there representing you as a lawyer? A. No.

Q. You were there with Mr. Grutze, and had some conversation with Mr. Rockwood here?

A. I went up there with Mr. Grutze; he is a friend of mine.

Q. And that statement he is asking concerning, if I understand your testimony correctly, you did make that statement to Mr. Rockwood, but that was not a full statement of the whole thing, as I understand?

Mr. ROCKWOOD.—I object to that as a leading question.

Mr. DIBBLE.—Strike that out.

Q. That part that he mentioned there, that you were thrown from the train, and woke up in Glasgow, you may have said that, and that is true, is it?

A. Well, yes. That is a general statement.

Q. Were you undertaking at that time to give all the details of what happened to you?

(Testimony of W. G. Shellenbarger.)

A. No.

Q. Were they trying to find out the details of it?

A. No, I don't think so.

Q. To pin you down? A. No.

Q. And this Dr. Pease you speak of; you were examined by Dr. Pease, you say. He was employed by the railroad company, [126—86] wasn't he, to examine you? A. Yes, sir.

Q. For the purpose of testifying in this case?

A. Yes, sir.

Q. And now they said you made some statement to Dr. Pease there, that you were thrown from the train and woke up in the hospital.

Mr. ROCKWOOD. — That isn't the statement there, of course.

Mr. DIBBLE.—What was it? So I get it right.

Mr. ROCKWOOD.—The last he remembers, he was walking in a car aisle. The next he remembers, he was in a hospital as Glasgow.

Q. If you told that to Dr. Pease, that was true, wasn't it?

A. Yes, when I went before Dr. Pease I went to the doctor thinking he was going to make a physical examination, and—

Q. Did you have your doctor—was I up there, or any of your counsel up there with you at that time of the examination, any attorney with you?

A. No.

Q. You understood you were to be examined by him, to find out your physical condition?

A. Just simply made the general statement about

(Testimony of W. G. Shellenbarger.)

other things, but I gave him facts about my physical condition.

Q. Dr. Pease was not trying to pin you down there, and be a lawyer, in the case, was he?

A. No.

Q. And getting the details of this thing?

A. No, sir.

Q. Just wanted to know generally what experience you had been through. Is that the way it was? A. That is right. [127—87]

Q. They have spoken about your glasses here. What was your habit of wearing glasses, when you were walking, for instance?

A. I always wore them.

Q. And when you say you wear glasses all the time, that means you always have them on when you are walking around? A. Yes.

Q. Or might you take them off when sitting down in a room, or something like that?

A. I never take them off.

Q. Always have your glasses on?

A. Wear them all the time.

Q. When walking—in walking through the car, would you have your glasses on? A. Sure.

Mr. ROCKWOOD.—I object to that; that is not competent.

Q. Was there any reason at that time why you should act any different on this occasion than you were in the habit of doing? A. No, sir.

Q. Was there any reason why you should not be wearing your glasses? A. No, sir.

(Testimony of W. G. Shellenbarger.)

Q. This writing that counsel exhibited to you there, and afterwards showed to me, on that sheet of paper there, written in ink, that upper part he never asked you about that; that upper part, that whole long page, that is not your handwriting, it is?

A. No.

Q. You never wrote anything on there?

A. I don't remember ever seeing that before. I don't remember of ever—anything of that kind ever being presented to me. [128—88]

Q. But you can't remember one way or the other whether you signed that paper he showed you, or not?

A. It might be that I did sign it. I couldn't say. But I don't have any recollection of it.

Q. But all the writing in the body of it, that is somebody else's writing? A. Yes, sir.

Q. Do you have any recollection of being taken into this hospital? Mr. Cheney says you were unconscious; that they picked you up on the right of way and put you in a conveyance? A. No.

Q. Were you conscious of being carried along by that means to this hospital? A. No.

Recross-examination.

(Questions by Mr. ROCKWOOD.)

I don't want any misunderstanding, Mr. Shellenbarger, about the conference with Mr. Grutze. When you came up Mr. Grutze was your friend and brought you up there to me, members of our office, who he told you represented the Great Northern Railway Company. Is that correct?

(Testimony of W. G. Shellenbarger.)

A. Yes, sir.

Q. And at that time you told us that you had no lawyer hired. Isn't that true? A. Yes, sir.

Q. And you came up to see whether—well, just talk over the case with the representatives of the Great Northern, and Mr. Grutze, as far as he represented anybody, was your representative?

A. No, he wasn't; he wasn't my representative at all. He just simply went there to be there. He said he knew you, had come [129—89] in contact with you, and I had talked to him about my condition. He said that he would go up with me to talk it over and see whether—what I wanted to do. So I felt, and my object in coming to you, was to have some satisfaction in this, and not have to go through what I had to-day.

Q. But we couldn't get together. That is all.

Witness excused. [130—90]

TESTIMONY OF DR. E. B. McDANIELS, FOR PLAINTIFF.

Dr. E. B. McDANIEL, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. McDaniel, you are a practicing physician and surgeon? A. Yes, sir.

Mr. ROCKWOOD.—I admit the Doctor's qualifications.

(Testimony of Dr. E. B. McDaniel.)

Q. Your office is where, Doctor?

A. In the Pittock Block.

Q. And has been for a number of years?

A. Yes.

Q. You have a brother also who is a physician and surgeon? A. Yes, sir.

Q. And your name is Dr. E. B. McDaniel?

A. Yes, sir.

Q. Bruce, E. B., and your brother's name is Roy?

A. Yes, sir.

Q. Does Roy McDaniel hold any position—is he employed in any way by the Great Northern?

A. Yes, sir.

Q. State whether or not your brother is Chief Surgeon in Portland for the Great Northern.

A. No, I don't think he is classed as Chief Surgeon.

Q. About how long has he been surgeon for the company? A. That I can't answer.

Q. But he is still surgeon, is he?

A. Yes, sir. [131—91]

Q. And has he been surgeon for the company for a number of years? A. Several years.

Q. And you belong to the—do you belong to the Knights Templars? A. I do.

Q. State whether or not it was because of that—if it is a fact—

Mr. ROCKWOOD.—Just a minute. I think that is immaterial.

Mr. DIBBLE.—I just want to show how he come to meet the train.

(Testimony of Dr. E. B. McDaniel.)

Mr. ROCKWOOD.—The question is, who called him?

Mr. DIBBLE.—Yes, that is the way to get at it.

Q. How did you come to meet the train, to meet Mr. Shellenbarger?

A. I think a wire from Glasgow, from Joe Freck.

Q. Do you recall who wired you from there?

A. I think Joe Freck. I won't say positive. But some of the boys at Glasgow sent me a wire.

Q. And the purport was that you should meet the train there and take—

A. Take care of Mr. Shellenbarger.

Q. Take care of Mr. Shellenbarger, which you did? A. Yes, sir.

Q. And then you took him where, Doctor?

A. To the Good Samaritan Hospital.

Q. State whether or not you treated him all the time he was at the Good Samaritan Hospital?

A. I did.

Q. Do you recall—would you know offhand how long he was there; he says six weeks.

A. I think he went in on the 26th of July. I should say there [132—92] six weeks; I don't remember the exact dates now.

Q. Did you take any pictures of him there?

A. I did—had them taken.

Q. Do you know whether or not any X-ray pictures were taken of Mr. Shellenbarger before he was sent to Portland?

A. I don't think so; I didn't understand there had been.

(Testimony of Dr. E. B. McDaniel.)

Q. As far as you know, were no X-ray pictures taken at Glasgow, Montana?

A. I don't think there were; as far as I know, there were not.

Q. Did you bring with you, Doctor, the pictures that were taken at the Good Samaritan Hospital?

A. Yes, sir.

Q. Would you just take them out, please? Have you any memorandum on there, Doctor, that would show when the picture was taken?

A. Yes, I think there is.

Q. Just state when the X-ray pictures were taken.

A. The ones taken at the Good Samaritan Hospital were taken July 27, 1928.

Q. Would you take one of those, Doctor, and say what it is? How many pictures in all did you take, Doctor?

A. I don't know how many are here. These are two taken at the Good Samaritan Hospital; these are just head pictures. I think four were taken, four or five.

(Two films offered in evidence and marked Plaintiff's Exhibits 1 and 2.)

A. Now, this is a picture of Mr. Shellenbarger's head, taken in the Good Samaritan Hospital, on July 27, 1928, two days after he came in, showing a side view of the head.

JUROR.—We can't see through you. [133—93]

A. I was just looking to find that crack, so I could get out of way. I don't know whether you

(Testimony of Dr. E. B. McDaniel.)

can see from that distance. Right along here see a little black irregular line that runs this way. That is where the medial fracture of the skull was. These other dark lines here are suture lines; not the one that comes along, but over above the hard line, comes along here, about two and a half inches long, right below that mark.

Q. State whether or not, Doctor, that picture—state whether or not that photograph, Plaintiff's Exhibit 2, shows a fracture of the skull?

A. Yes, it does.

Q. And that is called what kind of a fracture?

A. Linear, just split, without bone displacement.

Q. State whether or not such a fracture could be caused by a person falling and striking on his head?

A. Yes, sir.

Q. If a man was thrown from a train and struck on a right of way, would it be likely to cause an injury of that character? A. It could.

Q. Aside from the fracture of the skull, would there not be concussion?

A. Yes, there would.

Q. Now, referring to Plaintiff's Exhibit 1.

A. That is another posterior picture, taken from forward back through to the back of the head. This does not show the fracture; nothing on that to show.

Q. That is taken just as you look towards the frontal bone? A. Yes, sir.

Q. Have you some other pictures? Have you any pictures of [134—94] the shoulder?

(Testimony of Dr. E. B. McDaniel.)

A. This is a picture of the right shoulder of Mr. Shellenbarger taken in December, 1928, after he got out of the hospital; he still was complaining of his shoulder; and right on the point of this bone here, below the scapula or the shoulder blade, is a small chipped out fracture, practically healed up there.

Q. State whether or not that could be produced by falling? A. Yes, sir.

Q. From a train, striking—

A. Yes. Now this is a fourth, taken in February, 1929, of the same shoulder, showing how this piece has healed in here. These other X-rays here are pictures taken later on, of the head, and do not show fracture.

Q. Does it show any callus?

A. No, didn't show callus in that; they are practically negative pictures.

Q. They are practically negative? A. Yes.

Q. Would they be of any assistance to the jury?

A. I don't think so at all.

Q. Doctor, aside from the fracture of the skull which you have described here, what other injury could there be following a fall from the train?

A. Well, in his case, he had more or less concussion; he had this fractured shoulder blade, and general bruises that come from an injury of that kind.

Q. And what effect does the concussion of the brain have upon the person receiving it? What symptoms flow from that?

(Testimony of Dr. E. B. McDaniel.)

A. We might have a general condition of unconsciousness if the concussion was severe.

Q. And what effect does concussion have? For instance, would [135—95] it cause headaches, would it cause a man to have headaches?

A. Would temporarily; yes.

Q. And how extensive would the headache be? Would that be commensurate, depending upon how severe the concussion was?

A. Absolutely. I considered, when Mr. Shellenbarger reached Portland, that the concussion was over; that he had this fractured bone, and the after effect of that.

Q. Did he seem to suffer any pain, or suffering?

A. Yes, he did.

Q. Did he make any complaint of that sort?

A. Yes.

Q. What did he complain of, Doctor?

A. Pain in his head, pain in his shoulder, general soreness.

Q. From the examination you made of him, what you knew of his condition, would that naturally follow from his injury? A. It would.

Q. Is there anything else that you noticed wrong with him, except what you have mentioned?

A. Well, he had a lot of trouble. I don't remember all the details as they came up; he was a sick man there for quite a while; had all the things that come from a man being shot off that way, like trouble with his bowels, and things of that kind. I don't remember the details of it.

(Testimony of Dr. E. B. McDaniel.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Doctor, from your knowledge of the history of this case, is there any present effect that you know of that you can trace from this fractured skull?

A. A man can never tell exactly what the after effect of a skull fracture is; but this is one of the fractures that [136—96] you would not expect any after effect from.

Q. You would not expect any after effect?

A. You would not; you never can tell. But the kind of a fracture, similar to a linear crack, without depression, that is the kind you would not expect; what may happen, nobody can be sure.

Q. There was no compression on the brain as a result of this fracture?

A. Not after I saw him, at all; no evidence of it.

Q. Does the picture indicate that the fracture which was a linear fracture, is healed up?

A. The last picture, yes.

Q. These last pictures were taken in February, 1929?

A. I think that is the date; I don't remember exactly.

Q. That is, eight months after the accident the fracture was healed up?

A. It didn't show on the X-ray plate.

Q. When did you examine him last, Doctor?

A. I think it was in February, 1929.

Q. You haven't attended him since that?

(Testimony of Dr. E. B. McDaniel.)

A. I haven't.

Q. At that time what was your opinion as to his physical condition?

A. Well, he was improving gradually. I told him I thought the best thing he could do was to try to go to work again.

Q. It was your opinion at that time that he was able to go to work?

A. I thought he could go on with his work, thought it would do him good to get his mind occupied.

Q. This injury to the shoulder, is that completely healed as [137—97] far as you can see?

A. Oh, yes.

Q. There is no—as far as you know, there is no permanent injury as the result of that chip off the bone in the shoulder?

A. I don't see why there should be; it is below the joint or shoulder-blade; I don't see why it should affect his shoulder any.

Q. There was no injury to the joint itself in connection with the fracture of the shoulder?

A. No.

Q. You have described it, I think, as a chipped out fracture. A. Yes.

Q. Just so we will be clear, which side of the head was the fracture on?

A. If I remember right, on the right side. These pictures here are not stamped, and I am not sure.

Q. Was no fracture at the top of the head?

A. No.

(Testimony of Dr. E. B. McDaniel.)

Q. Now, as a matter of fact, concussion of the brain shows itself in being knocked out and becoming unconscious. That is right, isn't it?

A. Generally.

Q. A prize-fighter that gets knocked down and is unconscious, he has concussion of the brain?

A. Yes, sir.

Q. And the same way, a football player, if he is knocked out temporarily, he has concussion of the brain? A. Yes, sir.

Q. Anybody that is knocked out and becomes unconscious from a bump on the head, has concussion of the brain. Is that right? [138—98]

A. Yes, always. Concussion is spoken of simply as a jar. Destruction of brain tissue—

Q. And the fact there is concussion does not indicate at all there will be any permanent effect from that? A. No, not necessarily.

Q. And I think you have already stated that you have no evidence that you know of, from which you could trace from this injury any permanence afterwards?

A. No, no objective symptoms. I am basing my observation on what Mr. Shellenbarger told me of his symptoms.

Q. And of course in the subjective symptoms you have to depend entirely on the patient?

A. Absolutely.

Redirect Examination.

(Questions by Mr. DIBBLE.)

Well, Doctor, did you hear Mr. Shellenbarger's

(Testimony of Dr. E. B. McDaniel.)

testimony? Were you in the courtroom when he testified?

A. I heard part of it, but I couldn't hear much of it.

Q. Did you hear his testimony concerning where he is working at this time, and his loss of memory, and things of that sort?

A. I could hear some of it there, yes.

Q. State whether or not those conditions would probably arise from an injury of the character he received here?

A. Nobody can tell about that.

Q. I see. Then they are called subjective symptoms, Doctor. But is it not a fact that that type of subjective symptoms accompanies this sort of injury? A. They might.

Q. Assuming a man were thrown from a moving train, and struck [139—99] on his skull sufficient to fracture it, produce the linear fracture described here, and suffered a concussion which rendered him unconscious, would not the severity be such as to still cause a man to be impaired physically?

A. I say it might do it. There is no evidence of brain injury after Mr. Shellenbarger came to me.

Q. That is as far as the pictures were concerned?

A. No, as far as the symptoms were concerned.

Q. But if he is truthful in saying he has headaches, if he does have them, could that be attributable to this?

A. I have no reason to doubt Mr. Shellenbarger's

(Testimony of Dr. E. B. McDaniel.)

statement of what he is going through. It is something nobody can prove, or disprove.

Q. But would present headaches be likely to follow an injury of this kind, or could it follow?

A. It could, yes.

Q. And the difficulty he speaks of in walking, stepping up, etc., or the difference in his gait, could that be caused by his injury?

A. Oh, any kind of symptoms might follow a head injury.

Q. Did you ever make any examination of him to see if he had what we call Romberg?

A. Yes.

Q. What is the fact on that?

A. No symptom of nerve injury at the time I saw him in the hospital. I haven't seen him for months at all.

Q. You haven't seen him recently? A. No, sir.

Witness excused. [140—100]

TESTIMONY OF DR. M. G. McCORKLE, FOR PLAINTIFF.

Dr. M. G. McCORKLE, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. McCorkle, you are a practicing physician and surgeon? A. Yes, sir.

(Testimony of Dr. M. G. McCorkle.)

Q. And you are regularly licensed to practice under the laws of the State of Oregon?

Mr. ROCKWOOD.—We admit his qualifications.

Q. He admits you are a good doctor, or at least qualified. Do you know Mr. Shellenbarger, the plaintiff in this case? A. Yes, sir.

Q. State whether or not you have acted as his physician in treating him for injuries following the accident involved in this case?

A Since the 15th of October, 1928.

Q. And since that time state whether or not you have attended him, and how often, and what you have done.

A. Well, I have attended him quite often, and have accomplished some in my treatment.

Q. When he came to you in October, 1928, what evidence of injury was there at that time that you discovered, what did he complain of?

A. Well, he complained of pains in his head, dizziness, pain in his shoulder, and some in his back, and inability to use his limbs properly in walking, and of being dizzy walking [141—101] on the street, or trying to turn around.

COURT.—Speak a little louder, please.

Q. Did you know Mr.—how long have you known Mr. Shellenbarger? A. About twenty years.

Q. Did you ever have occasion to treat him as a physician before this accident? A. No.

Q. And do you know, aside from being his physician, what his general condition of his health was

(Testimony of Dr. M. G. McCorkle.)

as you saw him about Portland during the past twenty years?

A. Well, it apparently was very good, because he was very active all the time I came in contact with him.

Q. Well, following this accident, Doctor, since you have seen him, that is, as a physician, and otherwise, is there any change in his condition and in his appearance from what it was before the 13th of July, 1928? A. Yes, sir.

Q. In what respect is he different?

A. Well, he is apparently partially dazed and complains of pain and for a long time he was very sleepless.

Q. Now, Doctor, assuming that Mr. Shellenbarger, while riding on the train, was thrown through the air, through the vestibule of the train, and struck upon the right of way, where was soft mud, I believe; the ground was not as hard as it might have been, but he struck on this mud after being thrown from the train, and was rendered unconscious. State whether or not such an occurrence as that would be likely to cause a fracture of the skull? A. Yes, sir. [142—102]

Q. And did you see the fracture that was shown upon the plate, by Mr. McDaniel? A. No.

Q. You didn't see that. You were back further in the room. But state whether or not such an accident could produce a linear fracture, or fracture of the skull? A. It could, yes.

A. And aside from the fracture of the bones, what are the common results of a fall of that nature, so

(Testimony of Dr. M. G. McCorkle.)

the jury will understand what might happen to a man, in addition to having a bone broken?

A. Well, he might have hemorrhage, he might have following inflammation of the meninges covering the brain.

Q. And may there, or may there not be, severe concussion of the brain, without a fracture of the bone too?

A. Oh, yes, we have concussion without fracture of the bone.

Q. Would an injury like I have described, a man being thrown from a moving train this way, and striking sufficiently hard to fracture the skull, would that, or would it not be likely to cause concussion? A. Yes, sir.

Q. How severe concussion might it cause?

A. That I couldn't say.

Q. How lasting would that concussion be?

A. Well, concussion itself, unconsciousness, is of different durations.

Q. Would a fall of that nature, receiving that fracture and that concussion, would that cause a man receiving it to be dizzy afterwards, or have dizzy spells? [143—103] A. It could.

Q. Would that be an unusual or a reasonable happening?

A. Well, in his case I think it is true.

COURT.—What?

A. In his case I think it is true.

COURT.—*General* speaking, he is asking the question.

(Testimony of Dr. M. G. McCorkle.)

A. Oh, generally. Well, I have never had enough head injury cases to say whether it would be general or not. Some that I have had, have had it.

Q. And what has Mr. Shellenbarger complained of during the time you have treated him? What has been his complaint, his difficulty?

A. Well, weakness, inability to concentrate, locomotion, deafness, and pain.

Q. State whether or not those conditions that he complains of, would they, or would they not be likely to flow from an injury of the character that he received here. A. Yes.

Q. Would it be unusual in any way for him to experience that trouble?

A. I didn't get the question.

Q. Would it be unusual in any way for him to experience that sort of trouble? For example, take headache. He still complains of headache.

A. Well, it is due to the injury.

Q. Would it be possible, medically, or probable at all, that he would suffer from headaches now? Here it is two years after the accident occurred?

A. It is possible.

Q. And has he been complaining of headaches? [144—104] A. Yes, sir.

Q. And has he been complaining of headaches?

A. Yes, sir.

Q. And what would cause a headache such as he has, or this pain he describes? What could produce that? What is the reason for it?

(Testimony of Dr. M. G. McCorkle.)

A. Well, I think it is due to the adhesions of the coverings of the brain, disturbance of the lower part of the brain, perhaps the anterior, posterior, pituitary glands.

Q. Did you make any examination of him for his nervous condition? A. Yes, sir.

Q. Just describe to the jury what examinaion you made, and the result of it.

A. Well, we tested out his reflexes, and his walking on a line; by shutting his eyes and trying to stand still.

Q. When he would close his eyes and stand with his heels together what happened?

A. He would wave.

Q. What does that indicate medically?

A. It indicates an injury to the brain somewhere.

Q. And would a condition of that kind be likely to follow a fall such as he received? A. Yes, sir.

COURT.—Likely to? You say likely to follow?

A. Yes, sir.

COURT.—That is probably follow, or may follow?

A. These symptoms have followed this injury.

Q. What do you consider his present condition? When was the last time you examined him?

A. This week. [145—105]

Q. How do you consider his case progressing? Is he getting any better, is he recovering?

A. He is better than he was when he came to me, yes; but his physical condition I think is very poor.

Q. State whether or not you consider his injury

(Testimony of Dr. M. G. McCorkle.)

temporary or permanent in its nature. Do you think he will ever get well?

A. Well, I fear he won't.

Q. What makes you feel that way?

A. Well, there hasn't been enough improvement since the accident.

Q. What would you say as to whether or not he has been permanently injured as a result of this accident?

A. Well, he will be partially permanently injured anyway.

Q. In what respect will his injury be permanent? What will always exist, in your judgment?

A. He will always have trouble with his head, no doubt.

Q. What effect does a blow of this kind have upon the memory or ability to concentrate or think, or do mental work?

A. Well, that I couldn't say; the mental condition is impaired somewhat, to what it was before.

Q. And this difficulty with his gait, his locomotion, will that be a permanent condition, that dragging of the leg? A. I think so.

Q. You think that will be permanent also?

A. Yes.

Q. Do you think he will get relief from these headaches he is bothered with, these pains in his head? A. I don't think so.

Q. And Doctor, during this time that you treated him, that covers since October, 1928, to the present time, what is his [146—106] indebtedness to you

(Testimony of Dr. M. G. McCorkle.)

for medical service? What does he owe you up to this time?

A. Something over seven hundred dollars.

Q. We allege in the complaint, I think, $750.00, as being the doctor's bill. Have you been paid that money? A. No.

Q. State whether or not that is a reasonable charge for the services you have rendered?

A. I think so.

Q. Customary charge in this community for services of like kind and character? A. Yes, sir.

Q. And is there anything else I haven't covered? I am not a doctor, and I have some difficulty in examining physicians. Is there anything else that a jury should know concerning this man's condition, that I haven't developed here?

A. No, I don't think so.

Q. This fracture on the shoulder, shown by the picture, would that interfere in any way with the use of the arm?

A. Well, yes; he can't get his arm up as he can the other, and never sidewise, this way.

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Doctor, what is your practice,—general surgery, or some specialty?

A. Well, I did general medicine for thirty-five years, and surgery.

Q. Medicine and surgery, but no particular specialty?

(Testimony of Dr. M. G. McCorkle.)

A. Well, I have done quite a lot of surgery in the last few years. [147—107]

Q. You say the fracture in the shoulder does interfere with the motion of the shoulder. Have you ever seen an X-ray of that shoulder?

A. No, nor I didn't see the fracture did, but the shoulder was immovable—much less than the other. It hasn't the motion the other has, due to bruising no doubt, of the muscles, or some nerves, and it has atrophied some. The right arm has atrophied some.

Q. That is not the result of the fracture, is it?

A. It is the result of injury to the shoulder.

Q. Coming down to the injury, is that limitation a result of the fracture of the shoulder?

A. I don't know that.

Q. You were asked what caused the present condition, as shown by these subjective symptoms, and I think you said it might be caused by adhesions on the covering of the brain. Now is that your positive opinion, or is that what might cause it? Are you able to say that is the positive cause?

A. I think it is the cause.

Q. I beg pardon?

A. I think it is the cause, as best I can—

Q. You think there are adhesions on the covering of the brain? A. Yes, sir.

Q. You didn't see this case until some time after he had gotten out of the hospital?

A. No, sir.

Q. So you are not able to say whether at the time he went into the hospital, and at the time he came

(Testimony of Dr. M. G. McCorkle.)

out of the Good Samaritan Hospital, there was any evidence of brain injury?

A. I didn't see him? I didn't get the question. [148—108]

Q. You didn't attend Mr. Shellenbarger until some weeks after he had come from the hospital?

A. It was the 15th of October.

Q. I think he got out of the hospital after he was there about six weeks from the 28th of July; so you cannot say whether, at the time he left the hospital there was, or was not any evidence of brain injury?

A. I do not know.

Q. Now you say that when he shuts his eyes and stands with his feet together, he waves? What do you call that test? A. That is Romberg.

Q. Is that test a check on an injury to a particular nerve? A. Not particularly so.

Q. Now you say it is not? A. No.

Q. Now if he does waver it indicates some injury to some nerve?

A. Yes, sir, some to the brain; to the brain nerves, or upper end of the spinal cord.

Q. But you can't identify from that test, what nerve, if any, has been injured? A. No, I can't.

Q. You made some remark, Doctor, that you didn't handle many head cases. Does that mean you have just handled five, or five hundred? About how many have you handled? I just want to get some notion of your practice in brain injury work.

A. Well, I have did over twenty trepannings.

(Testimony of Dr. M. G. McCorkle.)

Q. Are you able to diagnose, Doctor, what particular nerve from the brain has been injured in Mr. Shellenbarger's case? A. No.

Q. Is there a particular nerve which controls the locomotion [149—109] of the legs?

A. Yes, we have sensory and motor nerves both.

Q. And that would be the motor nerve, would it, that would affect his legs to produce a shuffling gait, if there is such a thing in him? A. Yes.

Q. Are you able to diagnose and say positively there has been an injury in that motor nerve?

A. Well, there must have been for him to have this condition.

Q. Now, do the reflexes of the leg have anything to do with that motor nerve? A. Partly.

Q. What reflex in the leg is motivated or operated by this motor nerve?

A. Well, from the brain proper.

Q. I know. But this knee reflex, does that operate from some nerve?

A. Through the same system, yes.

Q. So if there is an injury to this motor nerve, affecting the locomotion, that should likewise affect this knee reflex. A. It does.

Q. You say it does? A. Yes.

Q. What is the nature of his reflex at the present time? A. Very much exaggerated.

Q. Were you present during the examination of Dr. Pease the other day? A. Yes, sir.

Q. So that Mr. Shellenbarger was taken care of, though his lawyer was not there? [150—110]

(Testimony of Dr. M. G. McCorkle.)

Mr. DIBBLE.—Upon the medical part, not upon how the accident happened. I don't know that he went up there to inquire about that, except generally.

Q. Now, what nerve in the head, Doctor, affects the memory?

A. Well, it is owing to what you mean—what kind of memory?

Q. Well, the kind of memory that he is troubled with not having. A. Partial aphasia.

Q. Now, is there any test to determine whether that nerve has been injured, other than a subjective test? A. Not that I know of.

Q. Now, the matter of dizziness and headaches, is there any way of determining what nerve has been injured, except by examination of the subjective symptoms? A. That is all.

Q. And when I say subjective symptoms, I mean the things that a man tells you, not what the doctor can find out for himself. That is correct, is it?

A. He presents symptoms there that indicates it. His own self is telling it.

Q. I didn't get the answer.

A. He presents symptoms that tell you that.

Q. Mere concussion of the brain, taken by itself, may not be serious at all. Isn't that correct?

A. May not mean practically anything.

Q. Anybody may be knocked out temporarily and have no permanent injury whatsoever because of it?

A. Possible; and then they may have permanent injury.

(Testimony of Dr. M. G. McCorkle.)

Q. I say, the mere concussion itself.

A. No—yes. [151—111]

Q. And does not mean necessarily permanent injury? A. No.

Q. Or permanent after effects? A. No.

Witness excused. [152—112]

TESTIMONY OF J. O. FRECK, FOR PLAINTIFF.

J. O. FRECK, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Freck, about how long have you lived here?

A. About twenty years.

Q. And you are engaged in what business?

A. Stationery and printing business, just across the street.

Q. Mrs. Freck, was that your wife that testified this afternoon?

A. I presume so; she was over—went out to come over here.

Q. Was she on the train at the time with you?

A. Yes, sir.

Q. What car*e* were you riding in, Mr. Freck?

A. I was riding in the last car, the car next to the observation-car; the next to the last car on the train.

Q. And did you see the accident? A. No.

(Testimony of J. O. Freck.)

Q. What was the first notice you had that there had been an accident?

A. Well, we were—Mr. and Mrs. Cheney and Mrs. Freck and myself were sitting in the last compartment on the car, that is the end next to the vestibule of the observation-car, playing bridge, and the first notice that we had of any accident or anything, some one stuck their head in our door and hollered that one of the Sir Knights had fallen off the train.

Q. And after that occurred, state whether or not you got up and went to see what had happened?

A. Yes, sir. [153—113]

Mr. ROCKWOOD.—Please don't lead the witness; just ask what he did.

Q. What did you do after that announcement was made? A. What is that?

Q. What did you do after that announcement was made?

A. Mr. Cheney and I jumped up and rushed outside, out to the vestibule.

Q. State when that was with reference to the time that they said the Sir Knight had fallen off the train; how long after that announcement was made did you get off it?

A. I don't understand the question.

COURT.—How long after you were told someone had fallen off the train was it that you went to the vestibule?

A. Immediately.

(Testimony of J. O. Freck.)

Q. And state what condition the train was when you went back there, as to being in motion or not.

A. We didn't go back; we were right there at the vestibule. The door of our compartment was right at the door of the car and in other words, it was next to the platform of the train—of the vestibule of the train where the Sir Knight feel off the train.

Q. When you went back there state whether or not the train was in motion.

A. The train was in motion when we jumped out, yes. When this Sir Knight hollered in the drawing-room to us the train was in motion, yes.

Q. Had it stopped yet after the accident? Had it got to Saco? A. No, sir.

Q. What was the condition of the vestibule there at the rear end of the coach? [154—114]

Mr. ROCKWOOD.—I repeat the objection this is not competent; not shown the condition was the same as at the time of the accident.

COURT.—Have to come to that by a process of elimination, I suppose. Go ahead; you can answer.

A. What is the question, please.

Q. What was the condition of the vestibule when you went back there, as to being open or otherwise?

A. The door to the vestibule was standing open from where—we went out on the vestibule, and the vestibule door and trap was open when we got out there, Mr. Cheney and I.

COURT.—On which side of the train?

A. It was on the north side of the train, sir.

(Testimony of J. O. Freck.)

Q. Which side would that be, left or right, as you would come from the observation-car and be going towards the engine? A. On the left.

Q. And now then state whether or not you noticed anything unusual in the operation of the train immediately prior to the time that someone stuck their head in the door, as you say, and said that a Sir Knight had fallen off the train?

A. I don't know how to answer that.

Q. You understand my question?

A. No, I don't. Anything unusual might mean anything; I don't know what you mean by that.

Q. About the movement of the train, to be more specific. Was there any lurching of the train, any movement of the train?

A. Why, I think—the reason I say this, we were sitting there playing cards, and naturally when you sit quiet and play cards, and dealing, things kind of move around a little bit; I thought was kind of a soft movement of the [155—115] train; there was a lurch, if that is what you want me to say.

Q. I don't want you to say anything but what the facts were, but if there was a lurch, when was that lurch with respect to the time when somebody said a man had fallen from the train; was it before or afterwards?

A. Was a very heavy lurch just prior to this man —I don't remember who the man was, whether the brakeman himself or who, but anyhow a very heavy lurch of the train. I know it kind of upset our game some, and the ladies made some remarks;

(Testimony of J. O. Freck.)

they can probably testify themselves what they said; I don't just recall what they said, but anyhow it was violent enough to upset our enjoyment of the game of bridge we were playing.

Q. When did that take place with respect to the time that somebody put his head in the door and said a Sir Knight had fallen from the train?

A. It was shortly before; I don't know how long before. Not very long; just shortly before that.

Q. You spoke about some other lurch; did you speak about some other lurch later on?

A. Well, we noticed a rolling there; I thought probably they had reballasted their track, and was soft roadbed; had been raining very hard.

Mr. ROCKWOOD.—I object to this kind of testimony; not responsive. No allegation about any defect in the track.

Q. Mr. Freck, let me ask you one more question: Was this lurch of the train that you speak of, was that just the ordinary motion of the train or was it extraordinary?

A. No, this was something more than just the ordinary roll of the train. I don't know what caused it.

Q. You don't know what? A. No, sir. [156—116]

Q. Did you get off the train to go back to where Mr. Shellenbarger had fallen?

A. After we got to the depot, yes, Mr. Cheney and I did.

(Testimony of J. O. Freck.)

Q. You went back with a machine as I understand it? A. With a machine.

Q. That is with an automobile?

A. Yes, just one automobile. Mr. Cheney and I got out, and got a young fellow there with an old Ford, and we drove back to the place of the accident.

Q. How far back was it where Mr. Shellenbarger had fallen?

A. Well, I should say—about half a mile probably; not very—I don't think over a half a mile; might have been a mile.

Q. As far as you know was the train ever stopped from the time Mr. Shellenbarger fell off until it was stopped there at the siding or station of Saco?

A. Was stopped at the switch, to go into the switch to let the west-bound train go by.

Q. But didn't stop any before that after he fell that you know of? A. Not that I know of.

Q. You observed Mr. Shellenbarger's condition there. Was he conscious when you saw him?

A. He certainly wasn't. You mean when we picked him up?

Q. Yes.

A. I thought he was dead until we got him into the automobile.

Q. Any blood about his person anywhere?

A. Yes, sir.

Q. Where was he bleeding?

A. Around his head. [157—117]

(Testimony of J. O. Freck.)

Cross-examination.

(Questions by Mr. ROCKWOOD.)

You say just prior to the time this man stuck his head in the door and told you that a Sir Knight had fallen overboard, you say there was a lurch, and then you spoke of another lurch after that. Was the second lurch a more violent lurch?

A. No, my recollection is the first lurch was the worst one; that is my recollection of it. That is quite a while ago now.

Q. So you cannot say how long prior to the time that man put his head in the door that this lurch occurred?

A. No, I can't. I wouldn't attempt to say. It was shortly before, and I would not say just when, but was shortly before that.

Q. And of course, you don't know what happened in that vestibule from the time that Mr. Shellenbarger fell out through it until you got there?

A. No, sir.

Q. When you got there in the vestibule, was the vestibule dome light burning up above?

A. I don't recall that.

Q. You would not say that it was not burning?

A. I would not, no, sir.

Q. And Mr. Shellenbarger, when you found him, was from half a mile west of the depot at Saco?

A. Yes, I should say so. We drove back, and of course we were all very much excited, and Mr. Cheney and this young fellow driving, the three of

(Testimony of J. O. Freck.)

us in the car, were all watching for this lantern up in the dark; that is the only light there was back there, and between the road was a sort of a ditch [158—118] with water in it and a fence, and then was an embankment on the track, and I got over and helped get the wire over; Mr. Cheney got across there and helped Mr. Shellenbarger over in the automobile, got him in there and took him back to the train.

Q. When you started from the depot in the automobile, could you see back up the track and see the lantern flashing around down there where Mr. Shellenbarger was?

A. No, I don't think I did. We just knew the lantern back there some place, and that is what we headed for.

Q. You didn't actually get off the train, Mr. Freck, until the train was on the passing track up there at the depot, did you? A. I did not.

Q. How did you happen to attend as a witness in this case?

A. You subpoenaed me, I *think was* you; and Mr. Dibble sent somebody for me and told me to come over here.

Q. You were subpoenaed by the defendant?

A. Sir?

Q. You were subpoenaed by me? A. Yes, sir.

Witness excused. [159—119]

TESTIMONY OF DR. JOHN A. SAARI, FOR PLAINTIFF.

Dr. JOHN A. SAARI, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Dr. Saari, you are a physician and surgeon, are you? A. Yes, sir.

Q. And are you licensed to practice under the laws of Oregon? A. Yes, sir..

Mr. ROCKWOOD.—I admit his qualifications.

Mr. DIBBLE.—I would like to develop a little further his qualifications.

Q. How long have you been practicing, Doctor?

A. In Portland about ten years.

COURT.—Counsel concedes his qualifications.

Q. I want to ask if I could, have you any specialty, of any sort, Doctor? A. Specialty?

COURT.—Yes.

A. In the army of course my work was bone and nerve work, for a little over two years.

COURT.—Have you specialized in that since the army?

A. Since the army, not particularly; practice general surgery and medicine.

Q. I wish you would state to the jury, Doctor, whether or not you made any examination of Mr. Shellenbarger. A. Yes, sir.

(Testimony of Dr. John A. Saari.)

Q. And for what purpose did you examine him? [160—120]

A. Well, I was told to go about the physical examination for court testimony.

Q. You wanted to find out what his condition was, for the purpose of testifying in the case?

A. Testifying, yes.

Q. At whose request did you make the examination? A. Well, at his own request, as I knew.

Q. And your office is where, Doctor?

A. Selling Building.

Q. Are you associated with Dr. McCorkle?

A. Yes, sir.

Q. You occupy the same office with him?

A. Yes, sir.

Q. I wish you would go ahead in your own way and state what examination you made of Mr. Shellenbarger and what in your opinion his present condition is.

A. May I refer to my history—rather this memorandum?

COURT.—Counsel asked what examination you made, not what history.

Mr. ROCKWOOD.—If I may examine the history when you are through with it. That is all right; go ahead.

A. I was relying on this memorandum; patient comes in for examination, Mr. W. G. Shellenbarger; age, 63. I asked him what he complained of; abnormal mental functions; physically inactive, unsteady gait, and previously—it is customary when a

(Testimony of Dr. John A. Saari.)

patient comes to the office for examination to take a history; this is as important as the physical examination; therefore I went into the history of the onset. Prior to July 13, 1928, the patient was well physically and mentally.

COURT.—That is what he told you? [161—121]

A. That is what he told me.

COURT.—The jury understands that is what the plaintiff told the doctor.

A. This is what the patient tells me, the history. Then while a passenger on a train met with an accident as follows: Going through the observation-car to the sleeping-car.

COURT.—I don't believe, Doctor, we will have that. I don't believe I will let him testify to that. The details of how the accident happened; he can tell—he has already told how the accident happened.

A. I was just reviewing my whole history.

COURT.—That is the very question we are trying here in this case.

A. What do you want,—just the physical history?

COURT.—Yes, certainly.

A. The physical alone. The patient appears fairly well nourished and developed, not actually ill looking; not alert mentally; walks with a very unsteady gait; and this is what I noticed without removing his clothing, when he comes to notice, the first observation; on inspection and observing the gait more and having him walk—

(Testimony of Dr. John A. Saari.)

COURT.—Have you any recollection of this examination that you can testify to, without reading from notes?

A. I can testify, but it is more accurate.

COURT.—I know.

Q. I prefer to have you put it away.

COURT.—Yes, because it is your conclusion.

Q. I am perfectly willing to do that way; just go ahead Doctor, and state what examination you made, and what his [162—122] present condition is, in your opinion?

A. When the patient came into the door of my office, the first thing I always look for is a principle of inspection—in that way we determine—

COURT.—You are telling what you did with this man, or what you generally do?

A. Just telling what I did with this man.

COURT.—That is what we are concerned with only.

A. He is not actually ill. Was not afflicted with an acute ailment. The man is of a retiring and very reserved nature, and appeared unalert mentally, and I noticed that his gait was unsteady. And as I had him approach a seat I noticed he had to hold the desk to sit down; then I had him get up and walk across the room again, to observe his gait further, and suddenly turn, and he sort of wobbled. I said nothing to the patient about that, but continued with the examination. I had inspected his head, or his scalp, to see whether there was any injury or scars, or deformity, or tumor, or anything

(Testimony of Dr. John A. Saari.)

like that. Examined his eyes, to determine whether or not the reflexes were disturbed. Examined his throat, teeth, tonsils, nose and neck, from his chest down to his toes. I reached the conclusion of what we call postural kyphosis, there is a deformity of the back, due to posture. His heart sounds are normal, regular in tone; no abnormal findings of the lungs; abdominal findings are normal. On examination of the extremities, his right shoulder there is evidence of some disturbance of the right upper extremity. In testing him out for function, he has a limitation of what we call hyperextension, that is the raising of the arms way above the vertical; there is a limitation in the right [163—123] arm, compared with the left; and also a limitation of adduction, that is pulling the arms and placing it out from the shoulder. The measurement of the comparative arms—I will have to refer to that.

COURT.—Refer to that.

A. First, we find that the muscles of the right arm are more flabby compared with the left arm, and the measurements at the level of the bisceps, the biscep muscle of both arms, the right arm measures ten inches in circumference, the left ten and five-eighths. The right forearm four inches below the elbow joint measures ten and three-eighths, and the left ten and a half inches. One-eighth inch difference there. There is also what we call an atrophy or shrinkage of the shoulder muscles on the right side.

Q. Now, Doctor, assuming that this man, Mr.

(Testimony of Dr. John A. Saari.)

Shellenbarger, was thrown from a steam train while it was in motion, and was thrown through the vestibule of the train and struck upon the soft ground of the right of way, state whether or not a fall of that kind could produce a fracture of his skull.

A. Yes, sir.

Q. In one of the exhibits we have here, one of the X-rays, there is shown what they call—I believe the doctor called, a linear fracture, which I think he said was upon the right side of the man's head. Could that kind of a fracture follow from this sort of an injury? A. Yes, sir.

Q. And would that be, likely, or unlikely to occur?

A. A fall is very likely to produce it, but it may not.

Q. But if a man did not have a fractured skull before, and was found to have one now by this picture, that would follow [164—124] from this accident? A. Yes, sir.

Q. And even though, Doctor, there were no breaking of the bones, would a fall of that kind have any effect on a person's brain, for instance, or other parts?

A. There may be intercranial injury with the fracture.

Q. What would be any evidence of that? What symptoms would a person complain of that had that sort of injury?

A. It might—of course would be no complaint as

(Testimony of Dr. John A. Saari.)

far as the patient was concerned, because he would be unconscious.

Q. I mean after the unconsciousness ceases, and the patient is able to go around. Would there be any effects from it?

A. The usual findings of headache, very severe headache, dizziness, sometimes nausea and vomiting.

Q. Take the matter of headaches, for instance. Mr. Shellenbarger complains of headaches, complains he still has headaches to this time. State whether or not from the fall, as I have described here, it would be possible for a man to have headaches at this time from that accident?

A. My opinion is it would be possible.

Q. Would it be unusual at all, or unlikely to happen?

A. Well, with ordinary intercranial concussion, which is really a misnomer, the immediate symptoms of headache disappear, that is, the constant headache, but there are recurrences that might be attributable.

Q. Take this gait you speak of, the difference or impairment in his gait. What is it that controls that? What nerve controls the gait of a person?

A. The motor system of the body controls the locomotion.

Q. Can an injury to the brain effect an injury to the legs? [165—125] A. Yes, sir.

Q. Affect the use of the legs? A. Yes, sir.

Q. And to what do you attribute his shuffling gait that you speak of? To what do you attribute that condition you say he had?

(Testimony of Dr. John A. Saari.)

A. It is possibly on account of the injury, because the history states that prior to the injury he was normal.

Q. This is a statement which is for a jury, of course, what he says; if that is true—if, prior to this accident, he was normal as far as walking is concerned, and has only had the diseases he has told the jury about, that is, whooping-cough and measles, and the breaking of his leg at one time—if that is true, and he now has this condition of his gait, to what would you attribute that present condition?

A. I would personally attribute it to the injury.

Q. Would that be contrary to medicine and surgery to come to that conclusion?

A. In my opinion it would not be contrary.

Q. Which side of the head, for instance, controls the leg?

A. Well, the right side of the head usually—the reflexes are on the opposite side; there is a crossing, what we call a cross-track.

Q. A blow on the left-hand side would affect the right leg? A. Yes, sir.

Q. What I am getting at is: Is it possible for there to be a severe blow upon the head, injuring the brain, in addition to a fracture, that might cause impairment in the use of a man's legs?

A. Yes, sir. [166—126]

Q. And what the present condition of his gait be attributed to if it isn't to this accident? Get at it that way,—with his history.

A. With his history I feel it is attributable to the

(Testimony of Dr. John A. Saari.)

injury; I removed,—in the examination, the laboratory examination, the possibility of constitutional diseases like syphilis. That gait and staggering, unsteadiness, can be produced by syphilis.

Q. Did you make any test for syphilis?

A. I made laboratory test of his blood, had a laboratory test, and the blood is normal, ruling out any possibility of constitutional diseases, which might produce the findings. He gives no history of alcoholism, which might produce a staggering gait.

Q. What is Romberg? There is testimony.

A. The Romberg test is applied to determine whether or not there is evidence of intercranial injury or disease.

Q. State whether or not you made a test of that kind. Did you make a Romberg test?

A. Yes, sir.

Q. State whether or not you made that test of Mr. Shellenbarger? A. Yes, sir.

Q. How was that test made, what did you do?

A. By having a patient stand with his arms to his side, feet together, and with the eyes closed. A normal person will stand erect without swaying; but where is evidence of injury within the brain, or within the skull cavity, injury or disease, we get a positive Romberg test, indicating there is what we call upper neuron lesion. [167—127]

Q. How did Mr. Shellenbarger respond to that test?

A. My interpretation of the test was that it was

(Testimony of Dr. John A. Saari.)

positive for Romberg, indicating intercranial injury.

Q. State whether or not he does sway when he stands there with his eyes closed and heels together.

A. Yes, he swayed.

Q. And that indicates nerve injury, injury to the nerves?

A. Not particularly to the nerves; to the brain itself.

Q. What is your opinion, Doctor, in view of the fact that this—

COURT.—Ask him what his opinion is as to its duration.

Q. What is your opinion as to the duration of this impairment of gait, for instance?

A. I don't think he will ever recover completely.

Q. And this impairment in raising his right arm, is that due to the shoulder injury?

A. That is a local injury.

Q. And might that get any better?

A. I feel he will get full use of that arm.

Q. But his gait is a permanent condition?

A. I feel that it is permanent.

Q. What about his pains in the head, and these dizzy spells and things of that kind?

A. Well, the severity of them could be modified, by colds or intestinal disturbances, or what not, but might recur, the severity. It is hard to estimate really the duration. I can't tell that.

Q. What would you say as to whether Mr. Shel-

(Testimony of Dr. John A. Saari.)

lenbarger has been permanently injured or not as a result of the injuries received in this accident?

A. My opinion he is permanently injured. [168—128]

Cross-examination.

(Questions by Mr. ROCKWOOD.)

Dr. Saari, it is your opinion there is some permanent injury, but that of course will not incapacitate him from performing some gainful occupation, will it? A. Some gainful? Probably can.

Q. If his work is the work of an office man, he will be able to continue his capacity will he not?

A. Depending on his capacity and the amount of mental work required.

Q. The testimony is that he has worked continuously in the capacity of superintendent of postal station from April, 1929, something like that.

Mr. DIBBLE.—Just a moment; there is other testimony of course; that is hardly a fair statement of what the testimony is, because, while it is true the testimony is he has worked that length of time, there is also testimony which the doctor should have, as to the conditions under which he has been doing this work—lack of memory and things of that sort, which are proper for the doctor.

COURT.—I presume it is counsel's purpose to show that during that time he has been receiving the regular salary.

Mr. ROCKWOOD.—Yes.

Mr DIBBLE.—No dispute about that.

Q. Is there anything you find that indicates that

(Testimony of Dr. John A. Saari.)

in the future he will be less able to work than he is now? A. I feel he is less able to work?

COURT.—Will he get less able as time goes on?

Q. No, you don't get the question. Considering he has [169—129] worked regularly for the past twenty months, is there any *indicate* that in the future he will be less able to work than he is now?

A. In his present health there may be some improvement, but it will be very slow, if any.

Q. Now most of this examination you made, Doctor, as to brain injuries, if any, was made on the basis of subjective symptoms, was it not?

A. The history was.

Q. And you spoke of the Romberg test. This test is not based on subjective symptoms, but even so a patient may produce an apparent positive result, though the actual condition of the brain may not justify a positive result; isn't that correct?

A. Well, if you are accustomed to watching this test, it can't be exaggerated or modified.

Q. It can be modified can it?

A. Somebody else who has not seen this test probably would think so, but a person who knows the sequence of events in the test can't be fooled.

Q. You were present also at the examination made by Dr. Pease, were you? A. Yes.

Q. Nausea is a very customary symptom for brain concussion, is it not? A. We have that.

Q. When did you make this examination?

A. Day before yesterday.

(Testimony of Dr. John A. Saari.)

Q. Doctor, how long have you been practicing medicine? A. Since 1916. [170—130]

Redirect Examination.

(Questions by Mr. DIBBLE.)

One more question: What effect, if any, would a fracture of the skull or concussion of the brain have upon the memory of the person that received such an injury?

A. Well, it can affect the memory very decidedly, as any injury to the brain may affect the memory.

Q. When it comes to this matter of his working, as counsel stated in his question, there is testimony that since April 1, 1929, Mr. Shellenbarger has been working in the postal station down here on Third and Oak, but there is also testimony that he can't remember, and that he can't carry on his work like he could before. State whether or not such a condition would be likely to result from a fall of this kind.

A. In my opinion it is very likely. With a fractured skull, one may get hemorrhage of the meninges surrounding the brain and have permanent effects which cannot be diagnosed clinically.

Q. Suppose this work of his requires writing, making out postal orders, people coming in there and wanting to send money to foreign countries, for instance; have to get the name and write the address, and do mental work; would an injury like he has here be likely to affect him any in carrying on that kind of work?

(Testimony of Dr. John A. Saari.)

A. It is possible, because sometimes there is failure to co-ordinate the ideas; the man's vocabulary may be limited.

Q. If Mr. Shellenbarger at this time is troubled with [171—131] a lack of memory and it is caused by the accident, what would be the likelihood of a recovery from that?

A. In my opinion it will be very slow, if any.

Q. Is there anything else, Doctor, that I haven't covered concerning this man?

A. I don't think of any.

Recross-examination.

(Questions by Mr. ROCKWOOD.)

Just one question. You didn't examine the X-rays that were taken of him, did you?

A. Not a complete examination. I wanted an X-ray; in fact went to the X-ray laboratory, but Mr. Robb refused to X-ray him because he had been X-rayed three days before and felt that two weeks interval should be given the patient for re-examination by X-ray.

Q. You didn't see the X-rays that Dr. McDaniel had taken a year or so ago?

A. Except from a distance over there.

Redirect Examination.

(Questions by Mr. DIBBLE.)

But this picture, Doctor, this exposure to the X-ray, picture taken three days before the time you wanted them, that was pictures taken by Dr. Pease, was it?

(Testimony of Dr. John A. Saari.)

A. Yes, sir.

Q. And so, if I understand you, Mr. Robb said it would not be safe for Mr. Shellenbarger now, at your request, to have more pictures taken?

A. Not for two weeks after. [172—132]

Q. Have to wait two weeks? A. Yes, sir.

Q. And do you know when it was that Dr. Pease took the pictures? A. I don't know, sir.

Q. The two weeks had not elapsed between that time and the time when you wanted to take some?

A. Mr. Robb said only three days had elapsed.

Witness excused.

Plaintiff rests.

Whereupon proceedings herein were adjourned until ten o'clock to-morrow morning. [173—133]

Portland, Oregon, Friday, Dec. 12, 1930, 10 A. M.

TESTIMONY OF DR. GEORGE NORMAN PEASE, FOR DEFENDANT.

Dr. GEORGE NORMAN PEASE, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Are you duly licensed to practice your profession as physician and surgeon in the State of Oregon?

A. Yes, sir.

Mr. DIBBLE.—We admit his qualifications.

Q. Doctor, have you done any special work or

(Testimony of Dr. George Norman Pease.)

had any special training in connection with injuries to the brain and spine?

A. Yes. During the war, when I went into Service, I was ordered by the Government to proceed to New York to enter a brain and spinal cord training course, which I took there. I was sent to Fort Oglethorpe in Georgia, where I taught that course to doctors going overseas, that is brain and spinal cord surgery.

Q. In your practice since that time, Doctor, have you had experience in connection with the diagnosis and treatment of injury to the brain and spine?

A. Yes, as I would see them in general surgical practice.

Q. Doctor, at my request did you make an examination of Mr. W. G. Shellenbarger within the last ten days? A. Yes, sir.

Q. What was the date of that examination?

A. I haven't the date down on my card, that is of the examination.

COURT.—What date did you say, Doctor? [174—134]

A. I haven't the date down on my card, Judge. I will just have to assume when that was. I have omitted to put it down here, what time it was.

Q. Wasn't that Monday afternoon, about a week ago last Monday?

A. Yes, I think it was about December 1st, of this year.

(Testimony of Dr. George Norman Pease.)

Q. Now, Doctor, in making that examination did you take a histo*yy* of this man as he gave it to you?

A. Yes, sir.

Q. Now tell us, will you, the history of the injury and the present condition as given you by the man.

A. Mr. Shellenbarger told me he had been hurt, and I asked him to tell all; I wanted to know about this accident. I asked him to tell me in his own words how he had been hurt, and I put down the history as he gave it to me. He said on July 13, 1928, while he was walking along the aisle of a moving train he suddenly remembered nothing; was walking along the aisle of a car or a moving train; he remembers nothing afterwards until he awoke in a hospital. This was in—he *work* up sixteen hours later in the Glasgow hospital. He further said that he was supposed to have had a fracture of the skull; that he remained in this Glasgow hospital for two weeks' time, and then he was removed to Portland. He had a cut over this right parietal eminence on the head, in this region right here; he said he *w*as no paralysis as a result of that fall; he had some pain at the base of his neck, but that his first complaint following the accident were body pains all over the body, bruises and headache, and difficulty in raising his right arm very high up. He further said that there was no vomiting; that there was no bleeding from the nose and ears, which we question very carefully [175—135] in cases of head injury. He *said was* no bleeding from the nose or ears; then I asked about his urine, because

(Testimony of Dr. George Norman Pease.)

in these cases, where a man is in a coma or unconscious he often has to be catheterized; he does not void; he has to be watched in that condition; he said he did not have to be catheterized. Then after two weeks moved from there to the Good Samaritan Hospital in Portland, where he came under the care of Dr. McDaniel. He told me that while in Portland his skull was X-rayed, and they told him there was a fracture of the skull. I asked about when he was in the Good Samaritan Hospital; he said he was there about two months, and that he had a long, slow convalescence, and that his chief complaints while here in the hospital were pain in the top of his head and poor appetite, and he slept rather poorly. Then I asked him on the day I examined him, December 1st, of this year, what his complaints were to-day as a result of the accident, which happened back in 1928. He said the chief complaints to-day were pains in the head, especially when he had to concentrate or think about anything; that he couldn't be hurried in making a decision. I asked if he was working; he said yes; asked what he was doing; he said he was employed in the postoffice, superintendent of a postoffice station, and he said that was the same work he was doing before he was hurt; said he didn't have this trouble in concentrating on things, and having to take time to think them out—he didn't have that trouble before he was hurt. I asked him about getting up at night to urinate, how he could get along at night; he said for the last five or six

(Testimony of Dr. George Norman Pease.)

months he had to get up at night to pass urine, which is a natural thing at his age; bowels somewhat constipated. I think [176—136] still a couple of other complaints here. After leaving the hospital I asked him about his condition then. He said he was still having pain in his right shoulder; that this shoulder bothered him only in reaching high up. This is the history as I got it from Mr. Shellenbarger.

Q. Up to this point in the testimony, Doctor, you have told us simply what was told to you by Mr. Shellenbarger?

A. That is his history of the case

Q. Now, did you take any X-rays in connection with this man—X-rays of the skull?

A. Yes, sir.

Q. You have those with you?

A. Yes, I have.

Q. I offer these X-rays in evidence as defendant's exhibit—four X-ray pictures of Mr. Shellenbarger's skull, two of them being Mr. Shellenbarger's skull 12/1/30, and four of them reveal Mr. W. G. Shellenbarger's cervical spine.

Mr. DIBBLE.—No objection.

(Marked Defendant's Exhibit "A.")

Q. Now, Doctor, that X-ray, Exhibit "A–1," with the illuminator; will you please point out to the jury what, if anything, these four plates show as to the present condition of the skull, and the other parts of the body that you have taken. They were all taken the same day.

A. This first one is a picture taken clear through

(Testimony of Dr. George Norman Pease.)

the skull as though looking straight at a man's forehead; this is the right side; this is the left; the orbits in this region are where the eyes are located; nostrils in the center. It shows completely the outline of the skull; these little places you see in here, irregular places, are simply [177—137] where the bones of the skull come together, because the skull is not just one solid bone, although we are solid ivory occasionally; there are several bones in the head; they articulate and fit in with one another; that is just where these bones fit in together; no fracture or anything wrong. This picture does not show any sign of any fracture of the skull, in fact it shows nothing wrong with the skull. This "A–2," as you can plainly see, is just a lateral view as though the man standing here and looking to the side; you are looking at the right side of the head; the front of the skull here, back of the skull here.

Q. From that, Dr. Pease, is there any present evidence of injury to the skull?

A. No. I might say that, leading up to it, on this here it might look as though there were breaks, but these are just blood vessels that are—that lie on the inside of the skull, right in the bone, and is not a fracture; just blood vessels which supply the brain; this is also a perfectly normal picture of the skull, and shows no fracture or anything wrong. "A–3" should be the same as the others; these are just stereopticon plates, so you can look at

(Testimony of Dr. George Norman Pease.)

two at once to get depth as well as flat surface. So this is practically the same as the other.

Q. What is the fourth one for?

A. Mr. Shellenbarger was complaining of pain in his neck as well as in the head. This picture was taken to show the neck from the base of the skull to the top of the chest—"A–4"—these seven vertebrae which are in the neck, seven cervical vertebrae, and these are the spines in the back of the neck; and this picture also shows absolutely normal outline and [178—138] nothing wrong with the vertebrae from the base of the skull down to the top of the chest.

Q. As we look at the picture, the left side of it as it is on the machine, is the patient's back; is that right?

A. This is his back; these are the spines which are in the back; he would be facing just as I am facing you now, across this way.

Q. Dr. Pease, this is an X-ray picture which Dr. McDaniel testified was taken, I think the 27th of July, 1928, within a day or so one way or the other, and from that he testified as to the condition of fracture at that time; will you look at that and see if you can see, or verify or determine whether there is a fracture of the skull as shown in that picture.

A. Well, here again are those blood vessels that we spoke of, lying on the surface of the brain and next to the skull, and here is the marker drawn down here which shows this line across here—here

(Testimony of Dr. George Norman Pease.)

—right here, come up so. This looks like what we call a line fracture; that is a crack like you would have in an ordinary dinner plate, which you could still use, but just a crack across the plate—the plate is still intact, perfectly level on both sides, but a crack across it; a linear fracture involving this parietal bone on the right side of the skull, and apparently about three inches in length.

Q. Now, Doctor, I show you two other X-rays, the first being Plaintiff's Exhibit 3, a picture of the right shoulder of Mr. Shellenbarger, taken at the same date in July, and Plaintiff's Exhibit 4, which is another picture of the right shoulder taken on February 16, 1929. Now, will you commence, [179—139] please, first with exhibit 3, as to the condition in July, 1928, and then exhibit 4, in February, 1929.

A. Well, I don't know—what is this? This is exhibit 3?

Q. Yes, exhibit 3.

A. This plate was taken when?

Q. July 27, I think it was, 1928, about two weeks after the accident.

A. Well, here is the collar-bone or clavicle coming out here. This is what we call the scapula or shoulder-blade, which lies behind, and the two things come forward; one comes out here to complete the shoulder-blade; the other projects right through here; here is one that projects right straight through; here is one that comes up from the back; these are both on this wing; that is the

(Testimony of Dr. George Norman Pease.)

scapula; the shoulder-blade, and the back. It does not show very much wrong. There perhaps, about right here—there appears to be—let's see what this other picture shows; that is about the same. There appears to be right here—this is what we call the Glenoid cavity; that is just a cavity about that size on the shoulder-blade in which the arm fits to make the shoulder joint. This looks as though might be a little piece of the bone torn loose just below the Glenoid cavity, which forms the shoulder joint. I don't know whether I make that very plain or not.

Q. Is that injury you point out in the joint itself?

A. As outlined, this joint, it looks as though it comes right down here; right across there, and that this lies just below the shoulder joint; right in here; the line, the joint line is right around there.

Q. Now, take a look at the next plate, Doctor, that is [180—140] referred to as Plaintiff's Exhibit 4, which was taken in February, 1929, some eight or nine months later, and tell us what that indicates as to the then present condition of that injury to the right shoulder.

A. This is practically the same as the other plate as near as I can see; this was taken later, the next year, 1929—right side. That same little defect shows, this spot apparently a quarter to half an inch long, and apparently just below the shoulder joint line again, which I think you can see outlined

(Testimony of Dr. George Norman Pease.)

here—see? This is the arm bone here. I would say these are practically identical, these two plates.

Q. Now, from these two plates would you be able to give an opinion as to the healing process, if any, which took place between the time these two plates were taken?

A. I see very little difference in the two plates.

Q. All right, Doctor; will you take the stand. Now, Doctor, tell us what test or examination you made of Mr. Shellenbarger, to determine the cause if any of the discoverable complaints which Mr. Shellenbarger stated to you.

A. State what investigation I made as to the cause of his accident, or what I found?

Q. No, as to the cause of his present condition, and as to what his present condition is.

A. Oh, in other words, what I found in examining him?

Q. Yes.

A. Well, the thing to determine, of course, in the case of Mr. Shellenbarger, admitting the fracture of the skull,—was there any injury to the brain, because a fracture of the skull, that linear fracture that shows there, means little if anything; we see people, boys of eleven, going to school [181—141] within two weeks of a fracture of the skull; there is no injury to the brain; a man has a fracture of the leg, then it is different; he cannot walk, but he is not using his head—we use our head to think with, so a fracture of the bony part of the skull, of that thin linear type, means little or noth-

(Testimony of Dr. George Norman Pease.)

ing unless there is injury to the brain beneath; in that with a fracture of the skull, like hit with a hammer, or fall from a height, so that the bone would press in and press on the brain, then it would be quite a different thing; be serious brain symptoms which have to be attended to immediately. But just a crack in the skull, like a crack in a plate, an ordinary dinner plate, is not important in itself, unless there is injury to the brain. As I say, I have seen children—have them here in Portland, within the last year—hit by an automobile and fracture the skull,—demonstrated by the X-ray—at school in two weeks' time. So the question here is was there injury to the brain. How are we going to tell that—that injury to the brain following a fracture of the skull; in the first place, what injury will the bone do? If the bone is depressed, knocked in, presses on the brain, it causes serious injury, epilepsy, coma, paralysis, and other things; if the bone is not doing that, as it does not seem to be doing in this case, then is there any bleeding as a result of this fracture that will press on the brain? Because the brain fits the skull just compact, like a hand fits the glove; can't stand much pressure; no room for anything much in there; so if as a result of this fracture there is bleeding from these blood vessels shown on the bone, would it compress? We get from that comatose, unconscious condition, sometimes [182—142] lasting eight or ten days; this blood would irritate the surface of the brain; we have areas on the brain that correspond to our

(Testimony of Dr. George Norman Pease.)

different parts, our face, our hands; thus as you see when a man is suddenly struck with something he wakes up and the whole side of his body is paralyzed; just a little bit of crush in the brain, maybe no bigger than a ten-cent piece, and the whole side will be paralyzed due to pressure. An examination was made of this man's nerves; there are twelve nerves, which we call the twelve cranial nerves, coming from the brain, the nerves of smell, the nerves of sight, nerves that supply the muscles of the eye-ball and so on, up to twelve; I examined all of these nerves in Mr. Shellenbarger; I found his sense of smell all right; sense of sight all right; the muscular sense—his pupils react at daylight but contracted when I used light and dilated when I took it away. In other words, I was not able to find anything wrong with these cranial nerves. I found no paralysis in the arms or legs; I had him walk; his gait to me is a normal gait, normal walk. I tested his reflexes, which is a symptom; we tap on him, which goes to the spinal cord; there is an impulse there that comes back again to the muscles, and we get contraction; if we get that we know that part of the spinal cord is all right; a few other tests—I don't want to go too far into this, so just a couple. There is the Babinsky test, which is scratching the sole of the foot; he was perfectly stripped during this examination, and if the big toe turns up when we scratch the sole of the foot with a pin, it means an involvement of the spinal cord. His toe did not turn up; made a perfectly

(Testimony of Dr. George Norman Pease.)

normal reaction; one of the tests I made is [183—143] the Romberg test, which is to have a man stand up with his heels together and toes together, and hands at his side, and then have him shut his eyes to demonstrate whether there is any ataxia, loss of equilibrium, staggering, etc. We hold the arms around them when they do that so they don't fall; he was perfectly normal he stood there, and I guess could have stood any length of time without wobbling, waving or falling; I tested around the abdomen, the cremasteric test, around the testicles; they were all normal; did just what they should do. Do you want me to go to the shoulder joint or just the brain?

Q. If you are through with the tests you made as to the brain I want you next to tell us what you did to determine the present condition of the shoulder.

A. I haven't brought out—I remember Mr. Shellenbarger complained about concentration and something was said about memory; we don't know a great deal about the brain; but the higher centers, memory, etc., are supposed to be located in the front lobes, in the front part of the brain where this injury was not; but nevertheless he remembered things. I remember one instance coming up; he asked me about my name and spoke about my grandfather, who was a Mason; he knew all about him; he has been dead twelve years now, I think; little things like that that came up during our conversation, convinced me that Mr. Shellenbarger

(Testimony of Dr. George Norman Pease.)
had no distinct trouble with his memory; lack of concentration; his questions—while he didn't respond quickly to me, like that, nevertheless his responses were thought out and careful and as far as those parts of the brain, memory and concentration, which are rather indefinite, it [184—144] seemed to me that he cerebrated; he replied normally to questions; his memory was all right. Naturally I inquired about his job. If a man is having trouble with his brain, can't remember, can't concentrate, he can't very well hold a job down, which is a postmaster job, money orders, etc., every day, and he told me—I believe I am correct—that he was doing the same job that he was doing before this accident happened, which also meant to me that the brain must be functioning in a pretty normal manner. I think that covers as I can recall.

Q. Come next to the shoulder, Doctor, and tell us what you did with respect to that.

A. The shoulder joint there had been some injury to, and as shown by the X-ray picture; that was of course a couple of years ago; the question to-day is has that shoulder embarrassed the use of his right arm at all, which is rather important. I found that he had practically all the motion in the shoulder joint, abduction, adduction, superation, all the things to do around the joint, with one exception. When I asked him to reach high up, I don't think he could get his arm up as straight as the left one, the good arm. In other words, there was some limitation of motion noted in getting

(Testimony of Dr. George Norman Pease.)

the arm high up. He could get it out, I would say, about like this, perfectly well, but a little higher than that the motion was limited; it might be due to this little fracture in the shoulder blade, that I saw lying just below the shoulder joint. But to me that is not a big thing, it is rather a small thing. And I think he has very excellent use, I would say, of his right arm.

Q. Now, from your examination, Doctor, what would you conclude as to whether or not there was any actual injury to the brain [185—145] at the time he sustained this fracture of the skull in July, 1928?

A. There is only one thing to explain in that, and that is this unconsciousness which he said existed for sixteen hours; after walking along the aisle of the car, he says he doesn't remember anything until he woke up in the hospital. Merely a period of unconsciousness all that time means a brain disturbance. But checking up on that we found no evidence of any paralysis anywhere. We found when we—now this fracture you saw in the plate, as I told you, went right above the right ear, and back this way for a distance of about three inches. A fracture of that kind, if there was no injury to the blood vessels, a simple crack of the bone, means nothing very much. If any injury to the underlying parts, take the blood vessels which line the skull, which you see there, if that was torn the blood is going to bleed right down, and we get the blood coming out of the middle ear. That is the reason

(Testimony of Dr. George Norman Pease.)
we ask about these symptoms in any skull injury. No bleeding from the ear in this case, no vomiting. There were none of those things which can point to any disturbance of the cranial nerves; no trouble with sticking out his tongue, opening and shutting his mouth, opening and shutting his eyes. All these come from nerves at the base of the brain. All those things were lacking, and it is only those sixteen hours there where unconscious that would indicate there was brain injury. But in all the other tests that I made I could find no evidence of any injury to the brain. I am inclined to think unconsciousness which lasted that long—which of course I don't know, I get that from his history—that it [186—146] was more or less of a shaking up—stunned, than any serious injury—injury to the brain in stunning it. That would have shown by all the tests we could make now, if there had been any injury to the brain. Those are what we get when we talk about an attack of epilepsy from an injury to the brain, of course, but where we do injure the brain, there comes little healing, or little scar tissue, then we get these attacks you hear about, people falling on the street, and by the time somebody gets there and picks them up, they recover; a little attack of epilepsy, something like that. A good many of these come from these injuries that injure the brain; not only fracture of the skull, but injure the brain. I could find then, as far as I am concerned, no evidence of injury to the brain, or

(Testimony of Dr. George Norman Pease.)
the covering of the brain, or the blood vessels, or the nerves of the brain.

Cross-examination.

(Questions by Mr. DIBBLE.)

Dr. Pease, you are associated, are you not, in your practice, with Dr. Chipman?

A. We are not associated; we share the same reception-rooms. We are not associated at all, any more than you and I are.

Q. But you occupy the same offices?

A. No; we have the same reception-room.

Q. And does Dr. Chipman have a son who is a lawyer? A. Yes, sir.

Q. And is this son employed in the office of Carey & Kerr?

A. Yes, he is in Carey & Kerr's office.

Q. And they are, as you know, attorneys for the Great Northern Railroad?

A. I believe they are. [187—147]

Q. And from that office comes Mr. Rockwood, to try the case here?

A. As far as I know, that is all correct.

Q. And the examination, Doctor, which you made on the first of December of this year, was made in behalf of the Great Northern Railway Company?

A. Mr. Rockwood called me up and asked me to examine this man, yes.

Q. Then you expect to be paid your witness fees by the Great Northern Railway, or by Mr. Rockwood, representing it?

(Testimony of Dr. George Norman Pease.)

A. I certainly am not working for nothing. Yes.

Q. And the examination which you made was made for the purpose of enabling you to come here at the trial of this case and testify as an expert witness in behalf of the Railway?

A. All right, that is one way of putting it. But, if I may put it in my own words, it seems very important; I examined this man with a perfectly open mind, knowing nothing of this accident, to see how much he had been hurt as a result of this accident. That is the way I would approach the case. All of what you say I think is quite true also.

Q. The purpose of the examination, when you come right down to it, was to enable you to come here as a witness and give your opinion as to this man's condition?

A. Absolutely. I was to testify exactly what I thought Mr. Shellenbarger's condition was.

Q. Now then, at the time you made the examination, which was made in your office, was it not, Doctor? A. Yes, sir.

Q. And there was not present with Mr. Shellenbarger at that time any attorney?

A. No attorney was present, that is true. [188—148]

Q. Dr. McCorkle and Dr. Saari were both present during the examination?

A. Yes, the two doctors were with me.

Q. And they told you, or you understood that they had been treating this man. Is that correct?

A. Well, I simply assumed, inasmuch as they

(Testimony of Dr. George Norman Pease.)

brought Mr. Shellenbarger to my office, that they were his doctors; yes, that he was under their care.

Q. But there was nobody there in his behalf, representing him legally?

A. No, we didn't have any attorneys present during the medical examination.

Q. Now then, with regard to getting the history of the case, Doctor, isn't it true that you did no more than any doctor does, examining under these conditions, endeavoring at the outset just to find out in a general way what had happened, as a basis for your further examination?

A. I think that is correct—what was that question?

(Question read.)

A. What do you mean by "did no more." "Know," or "no." I don't know what you are driving at.

Q. "No."

A. I did no more; you mean made no more examination?

Q. No.

A. Well, if I understand, I don't think that I can—

COURT.—I suppose what counsel means, did you follow the usual course that all doctors do in making examinations, in getting the history?

A. Well, yes, as I think I understand it. [189—149]

Q. What I am getting at, to make it a little more concrete, you were not at that time attempting,

(Testimony of Dr. George Norman Pease.)

when this man's lawyer was not there, to pin him down minutely as to the precise facts under which the accident occurred, for the purpose of using that against him for instance in his trial here; you were just inquiring generally what had happened to the man. Isn't that true?

A. Well, I make as careful—I get as careful a history as I can to find out how a man was hurt; that has some bearing on the case, how far a man falls, how he is hurt. I get as careful a history as I can of how the accident happens, and as carefully as I can I make my examination, to find out what are the results of that. Does that answer the question?

Q. Well, in a way it does, and not quite fully, either. Isn't it true that Mr. Shellenbarger told you he was thrown from a train, and fell a distance?

A. Thrown from a train? No, he gave me a history, as I understand it—well, he—no, he didn't say anything about being from a train; he said he was walking along the aisle of a moving train, and everything became blank. The next time he woke up he was in a hospital.

Q. Didn't you understand this man fell from the platform of a train, to the right of way?

A. I know nothing about where he fell; I just got that history.

Q. The man told you—

A. That is all he told me.

Q. In giving this testimony before this jury then, that this man hasn't anything wrong with him, you

(Testimony of Dr. George Norman Pease.)

are not basing that upon the real facts which existed, are you?

COURT.—Basing it on what the plaintiff told him. [190—150]

A. I admit that.

Q. Do I understand that you don't know now, in giving your expert testimony—are not assuming that the man did fall to the right of way and strike on the ground?

A. As far as my testimony goes it is made on what Mr. Shellenbarger told me; he became unconscious, he awoke in the hospital, he had a fracture of the skull, and an injury here—all those things I have gone into, that is all I know.

Q. If the fact is, Doctor, he was thrown from the train and fell a distance from the platform of the train, down to the right of way, if that is a fact, and struck violently and was rendered unconscious, that would make a difference in your testimony, wouldn't it, as to what injuries came from that?

A. No. The main thing in my testimony is what I found—what I find—if he fell from a moving train, that doesn't alter things at all.

Q. Didn't you say the question of how far a man falls had some bearing?

A. I mean by that, three or four stories, something like that; a real high fall.

Q. Can't you get a pretty bad injury to the head by falling six or seven steps? A. Sure.

Q. And striking on the head? A. Absolutely.

Q. And wouldn't you have a—isn't it a fact that

(Testimony of Dr. George Norman Pease.)

if this man did fall that distance, that would make a difference in what occurred to him?

A. Why not at all. [191—151]

Q. Now, going back again, I want to get that just cleared up, because I think I understand what you are trying to do. Isn't it a fact that when you talked to Mr. Shellenbarger about what had occurred, you simply talked generally with him, to get a general idea of what had happened?

A. No, I tried to state it, Mr. Dibble, that I wanted to get his own words just what happened to him, and I approached this thing with an open mind, knowing nothing about his accident, how badly he was hurt, and have him tell me, and those are his words to me, and that is what I have.

Q. Were you, in the absence of this man's counsel, trying to pin him down minutely as to just how he fell, for the purpose of using that against him at any future time?

A. No. Else I would probably have gotten into this—I read that over to him, and asked him, because it is rather unusual to have a man walking along an aisle of a moving train—that is the way he told me—and become unconscious and wake up in a hospital. You would think he would tell me he fell, or something like that; but those are his words, just as he put them to me, walking along in the aisle of a moving train. Maybe he would like to explain more, but I went over it twice with him. I remember reading his words, and that is exactly as he told it to me.

(Testimony of Dr. George Norman Pease.)

Q. But you were not trying to pin him down like a lawyer would, and get the fine points about it? All you wanted to know would be just the general points, what happened to him?

A. I don't think I could do that if I tried.

Q. The testimony is as it shows here; he was unconscious, and he woke up in a hospital after it happened, and what [192—152] he told you is in accordance with the testimony here. Now then, Doctor, you said there was no paralysis. Can paralysis result from injury to the brain?

A. Can paralysis result from injury to the brain? Why yes.

Q. And blows upon the head. For instance, a blow on one side of the head, as I understand it, may affect the lower extremities on the opposite side? A. It does.

Q. And the same thing is true the other way?

A. Yes, sir.

Q. So we do have in medical science many cases where they do receive blows upon the head and injuries to the brain which does result in paralysis?

A. Absolutely.

Q. And it can be so strong as to destroy a man's use of his limbs entirely, can't it? There can be total paralysis.

A. Wait a minute. Total paralysis?

Q. From a blow on the head, or from an injury to the skull.

A. Wait a minute. Total paralysis? You mean both legs?

(Testimony of Dr. George Norman Pease.)

Q. Anything. A. You cover an awful field.

COURT.—No evidence of paralysis.

Q. I am coming to another question.

COURT.—Go ahead with the question, and confine it to the issues in this case.

Q. Then Doctor, can there be a total, or partial paralysis of one or both legs, by reason of a blow upon the head and injury to the brain?

A. If it was bad enough.

Q. Beg pardon? [193—153]

A. If it was bad enough there would be death; that would be total paralysis.

Q. There are cases, of course, where a man strikes that way and is killed outright? A. Absolutely.

Q. Now, suppose the blow upon the head was not severe enough, or the injury was not severe enough to the brain, to actually destroy, to paralyze either one of the limbs, would it not impair the use of the limb to a limited extent? Couldn't a blow upon the head impair a man's gait, make him walk after that in a shuffling manner, even though not paralyzed. As the Court says, and I am not claiming this man's legs are paralyzed, but leading up to the other proposition, if a blow upon the head will aboslutely paralyze a man, is it not also true that a blow not quite so severe can seriously injure a man's leg and impair the use of it, even though it does not totally paralyze it? Couldn't that happen?

A. The limb can be partially paralyzed, yes.

Q. And if this man here had no trouble in walking before he was hurt, on the 13th of July, 1928,

(Testimony of Dr. George Norman Pease.)

and ever since that time he has had an impairment in his gait, couldn't that come from this accident?

A. It could come from the accident.

Q. And if, for instance in walking along the street, where he is going to go up on the curb, for instance, and where he is going to walk up to that witness-chair where you are, he has difficulty and he stumbles, isn't able to raise his leg properly to the required height, could that condition not come from the blow upon the head? [194—154]

A. May I ask a question in answering that? The one before this, could this accident have caused a disturbance of the gait? Does that mean with Mr. Shellenbarger, or with anybody?

Q. Anybody.

Mr. ROCKWOOD.—The questions to date are just general questions.

Q. Yes, anybody.

A. All right. Then the answers are the same.

Q. Because I am not asking you to say you believe what this man says at all; that is for the jury to say. A. I understand that.

Q. I am asking you, Dr. Pease, a question based upon his testimony, because he testified he has—

COURT.—Ask the question and don't argue.

Q. He does have an impairment? That makes it clear to you, Doctor?

A. Yes, I think I understand.

Q. And if ever since the accident Mr. Shellenbarger has difficulty in getting his feet to the required height in walking, that could follow from this accident?

(Testimony of Dr. George Norman Pease.)

A. Now, this is a point in Mr. Shellenbarger himself, as I understand. The first were general questions. Now you ask if as a result of this accident—this difficulty in raising his foot is a result of this accident?

Q. Could that result from the accident?

A. Could it result from the accident?

Q. Yes. A. Yes, it could.

Q. And if that continued now for two years after the accident [195—155] occurred, does that indicate that he has recovered from it, or otherwise?

A. Well, assuming that this did result, which I don't believe it did, and that he still has difficulty, then you would naturally say he had not recovered. I think that is simple.

Q. If he has not recovered now, there is not much likelihood he will. Is that true?

A. I don't know about that at all. But this is a hypothetical question, isn't it?

Q. Yes.

A. Let's see. Two years and over since the accident, isn't it?

Q. Over two years, you say, Doctor?

A. And if he had disturbance of gait—if a man had disturbance of gait two years after an accident, yes, you would think it might remain permanent, if it remained that long.

Q. You would naturally think in that time it would be cleared up if ever going to be. He complained, you say, of pain all over his body, and bruises, and headaches? A. Yes.

(Testimony of Dr. George Norman Pease.)

Q. Now, this matter of headache, Doctor, isn't it a fact that a chronic headache follows in a great many cases from fractures of the skull?

A. Generally the headache is not chronic; it is at the time of the accident, and it is generally over shortly after that, unless there is serious injury to the brain.

Q. What do you say about the general proposition, as to whether or not headaches do not frequently arise from fracture of the skull and from blows on the head?

A. They frequently arise at the time of the accident, and they would not continue unless there was brain injury. [196—156]

Q. Now, Doctor, you have made a specialty of brain injuries, and injuries to the spinal cord, as you have testified, in your service in the army. I may ask you if you are familiar with Scudder, a writer on the treatment of fractures? Is he a recognized authority on fractures?

A. Yes. Not so much fracture of the skull, as fractures of the extremity bones, and others. He is an authority on fractures generally.

Q. You are familiar with the work he has written on "The Treatment of Fractures." I don't mind showing it to you if it will help you. You are familiar with Dr. Scudder's work on "The Treatment of Fractures"? A. I have his book, yes.

Q. Is he a recognized authority on fractures?

A. Yes, Dr. Scudder is a recognized authority on fractures.

(Testimony of Dr. George Norman Pease.)

Q. I want just to call your attention to a matter here—you can follow along if you wish. He says here "Unfortunately immediate recovery from a head injury may not always imply permanent health." And then it says down here: "The following are found to be some of the later effects of head injuries; Chronic headache which may be gernal, over a large (frontal, occipital, etc.) area of the head, or local corresponding to definite scars in the scalp, or to tender areas upon the skull or neuralgic-like along the course of certain nerve trunks. Along with these chronic headaches are associated insomnia, mental depression, loss of appetite, inability to do any work, and a characteristically marked aspect." Refreshing your recollection or rather directing your attention more particularly to the situation, from this authority, isn't it a fact, Doctor, that chronic headaches frequently occur [197—157] from fractured skulls, even though the fracture heals and apparently is cured up?

A. Just as I said before, the headache at the time of the blow of the head, even though it may be very slight, is quite common, that is have headaches; chronic headaches, to persist years afterwards, if that were true, we would think that there may have been an injury to the brain, and the healing of scar tissue, etc.; we try and work that out.

Q. Now, a man getting a blow on the head, it is not exactly like hitting a dinner plate, as you described there. There are sensitive parts under that bone, and if this man were hit hard enough to crack

(Testimony of Dr. George Norman Pease.)
that bone there, it very likely disturbed something under that bone, didn't it?

A. No. That is the reason nature constructed the skull so, to protect the brain from injury; you get just a crack to this bone without any injury to the brain whatsoever. The skull is constructed for that very purpose.

Q. Aren't there lots of cases, Doctor, where there is no breaking of the bone, and yet there is a severe concussion of the brain?

A. Concussion? Yes.

Q. Injury of the brain, even though the covering of it, the bone, is not broken?

A. Yes. But understand, concussion now, means no injury to the brain; concussion of the brain means no injury to the brain.

Q. What is concussion?

A. Just simply stunned, shaking up of the brain. No demonstrable tearing of blood vessels or nerves, or anything that [198—158] can be shown. Just shaking up, or stunned, that is concussion.

Q. Now, if that shaking up and stunning can occur in cases where the bone is not broken even, most certainly it can occur where the bone is broken, can't it? A. Certainly.

Q. And it would be a more severe shaking up, and a more severe stunning if the bone was broken?

A. Quite right.

Q. Isn't it a fact that a man could get that kind of a blow, and that kind of an injury, and the fracture would unite, and yet that man suffer from

(Testimony of Dr. George Norman Pease.)

headache for years even, or more, after receiving the injury?

A. Well, I must ask again, if that applies to this individual?

Q. It applies in this way, that he has testified that he does have headache.

COURT.—The only question he is asking now is expert, Doctor.

A. Just a general question.

Q. General question.

A. Then let's have it again.

(Question read.)

A. That kind of a blow, that kind of an injury, could injure the brain also, if he suffered with chronic headaches for years after the accident.

Q. And this dizziness and deafness often occur with this sort of injury?

A. With skull injury dizziness and deafness often occur.

Q. So you agreed generally with the author here, with which you are familiar?

A. Yes, absolutely. [199—159]

Q. Now, Doctor, in answer to one of counsel's questions, you emphasize the fact that Mr. Shellenbarger is now working and you drew certain conclusions from the fact that he is down at the post-office, and is putting in the same hours, and drawing the same pay. But did you understand, Doctor, that he has had great difficulty in doing this work? Were you told that by anybody?

A. No, no.

(Testimony of Dr. George Norman Pease.)

Q. You are assuming that he goes down there and draws his pay and puts in the hours, and you are assuming also that he is functioning down there the same as he did before he was injured, aren't you?

A. Yes, I am assuming that if he wasn't doing his work, he wouldn't hold his job.

Q. Yes, but the boys say they are helping him, they are carrying him?

COURT.—Never mind what the men testify to.

Q. So now I am going to ask you this: If it is a fact, Doctor, that while he goes there to work, that he becomes confused, and can't remember, and can't make out his money orders like he used to, and at times he lies with his head in his hands, suffering from headaches, if that is the way he is doing his work, what would you say as to whether he is permanently injured or not?

A. This would have a bearing on it, naturally. But he didn't complain of this to me, when I was examining him, when he told me his history.

Q. I am not asking you to say that what he says is true, but if it is true that is the way he is working, that would alter [200—160] your testimony with respect to his capacity to work?

A. Why, yes; if a man told me he couldn't do his work that he was doing before, and of laxness, I would think different. But I would have to prove it by the other means, you know; I couldn't take his word for it, I would have to prove it by examination.

(Testimony of Dr. George Norman Pease.)

Q. This first picture, looking right at the head, that of course shows no fracture; but the second picture, the second and third, in fact, all our pictures— A. Yes.

Q. They do show a linear fracture of the skull?

A. Yes.

Q. Three inches in length? A. Yes, sir.

Q. And now is the fact that the pictures which you took of the skull, which you took on December 1st—the fact that they don't show any fracture at this time, that doesn't prove that he did not have a fracture, does it? A. No.

Q. Because—

COURT.—That is enough; he has said no.

Q. And he complains of inability to use his right arm and shoulder, and there is a fracture shown even on your picture, isn't there, of the shoulder? Or is that one of Dr. McDaniel's?

A. I haven't any picture of the shoulder. I was talking about your pictures.

Q. You took no picture of the shoulder?

A. No.

Q. The pictures that Dr. McDaniel took of the shoulder do show a chipping fracture, don't they, of the right shoulder? [201—161]

A. I called it the shoulder-blade; a little chipping of the shoulder-blade below the shoulder joint.

Q. Now, you spoke, Doctor, about the cases you have had where children, young children, get blows on the head, and then they went to school, after having a fracture of the skull, inside of a week or two, etc. Now I want to ask you if the age of a

(Testimony of Dr. George Norman Pease.)

person doesn't have something to do with what might happen to them if they had a fracture of the skull?

A. Yes; but I would rather be—have a fracture of the skull at sixty, than I would at the age of ten or eleven.

Q. But age does make a difference?

A. Absolutely.

Q. If this man was sixty-one—I think he says he is sixty-three now—if this man was sixty-one when he received this injury, don't you think that he would have more trouble in recovering from that, than he would if he were a younger man?

A. Yes, at the age of twenty or thirty, along there.

Q. Suppose instead of being that age, he is in middle age. For instance a man of thirty-five, we will say, or something like that, a man of that age would get a better recovery than this man would, wouldn't he?

A. Would expect him to; he would have better resistance, certainly.

Q. The fact that he was sixty-one when he got hurt is a serious factor, isn't it, Doctor? In his case? A. Certainly a factor.

Q. As far as recovery is concerned? A. Yes.

Q. And, if it is a fact that the man was unconscious when he [202—162] was picked up on the right of way, and remained unconscious for sixteen hours at least, if that is true, that shows right there that he had a brain injury, doesn't it?

A. No.

Q. Some evidence of brain injury, isn't it?

(Testimony of Dr. George Norman Pease.)

A. We would certainly look for one, with that history.

Q. And the epilepsy you spoke of, that can come along too, can't it, in cases where a man has a blow upon the head, and is seriously injured?

A. Yes, sir.

Q. Are there any cases where a man, especially an elderly man, receiving a severe blow upon the head, where they have apparently recovered, or at least the fracture was healed up, and years after it happened he develops epilepsy?

A. We have already stated was two years since his accident. If there had been any injury to his brain, certainly in two years—we have already testified to that—that his injury would probably remain as it was. In other words, as you said, if he had this disturbance it would probably remain so, but it might be a process—

Q. Well, I want—

A. Just a minute. The same thing applies if he had an injury to the brain, scar tissue, the healing would have occurred long before these two years, but he would be having the epilepsy spells now if he is going to have them at all.

Q. But there are instances aren't there, Doctor, recorded instances, where even a longer period than two years following a blow upon the head, and epilepsy has developed?

A. There are reported cases, yes. [203—163]

(Testimony of Dr. George Norman Pease.)

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, Doctor, you have been asked various hypothetical questions as to whether certain things in the nature of impairment of the gait, stumbling, etc., headaches, dizziness, and inability to concentrate, might result from a blow on the head sufficiently severe to fracture the skull. I just want to ask one question. In your opinion was there brain injury as a result of Mr. Shellenbarger's accident— A. There was not—I beg your pardon.

Q. —which results in injuring the nerves controlling the locomotion, and nerves which affect headaches, and nerves which bring in dizziness, etc.— did such a result follow Mr. Shellenbarger's injury?

A. No, there was no such injury, or no such result.

Witness excused. [204—164]

TESTIMONY OF J. M. HANLEY, FOR DEFENDANT.

J. M. HANLEY, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Hanley, by whom are you employed?

A. Great Northern Railway Company.

Q. Where? A. Havre, Montana.

Q. And what is your position with the Great Northern? A. I am a Division Engineer.

(Testimony of J. M. Hanley.)

Q. What is your capacity, civil engineer?

A. Yes, sir.

Q. Not an electrical engineer? A. No, sir.

Q. Are you familiar with the location of the tracks of the Great Northern Railway Company on its right of way at the station of Saco, and for a distance two or three miles west thereof, as they existed on July 13, 1928? A. Yes, very familiar.

Q. That stretch of track was within the territory in which you are occupied? A. Yes, sir .

Q. Now, at that time, in the middle of July, 1928, was there construction work going on at or near the station of Saco? A. Yes, there was.

Q. What was the general nature of the construction work—not the details, just the general nature?

A. They were constructing a branch line from Saco north to the Town of Turner; they were also making a connection [205—165] from the depot at Saco to this proposed branch line.

Q. Have you prepared a blue-print showing the lay-out of the operated tracks as they existed July 13, 1928? A. Yes, I have.

Q. Is this blue-print which I have in my hand and show to you the one prepared by you?

A. That is the one, sir.

Mr. DIBBLE.—I would like to ask a question: When was the map made?

A. The map was made last—a week ago today, Friday and Saturday.

Mr. DIBBLE.—When was the data gotten from which it was made?

(Testimony of J. M. Hanley.)

A. It was gotten in May, 1928,—from May, 1928, to October, 1928.

Mr. DIBBLE.—What I am getting at is, the data from which you made this map, was that taken at the time that this accident occurred?

A. Yes, sir.

Mr. DIBBLE.—Which was July 13, 1928.

A. Yes, was taken from the records, by which that track was laid out at that time.

Mr. DIBBLE.—We have no objection.

(Map offered in evidence and marked Defendant's Exhibit "B.")

Mr. ROCKWOOD.—This is a pretty long map.

Q. Will you come down here and stand with the pointer, and we will hold this up for you. Now point out the main line; point out on that map the depot at Saco. A. There is the depot, there.

Q. Point out the main line track; point out the west head-block on the side-track at Saco. [206—166]

A. Here is the west head-block to the side-track; here is the main line going west.

Q. At that time was there a parallel track in operating condition? A. No, sir, there was not.

Q. Was there any construction work going on, along the north of the main line, from a point near this switch, west for a distance?

A. Yes, from a point here.

Q. When you say "a point here" you mean a point shortly west of Saco?

A. Yes, just west of the crossing at Saco, they

(Testimony of J. M. Hanley.)

were constructing a parallel track along the main line here to connect with the proposed branch line that went to Turner.

COURT.—Which is the main line?

A. This is the main line, right here.

Q. In the middle of the right of way?

A. Yes, this is the south right of way line; this is the north right of way line. This is the county road, and this the main line. We were constructing a parallel track to connect with the proposed track of the Turner line, which paralleled the main line, north side.

Q. What was the stage of the construction work on the date of July 13, 1928?

A. The grading for the track which was under construction was completed on July 12th, and there had been some track panels laid along the outside of that grade; by track panels they mean just two rails and ties attached together, but they were just unloaded with a derrick, not connected together, and not in proper alignment; they were set in [207—167] there at various angles, as close together as we could lay with the derrick; were not yet in operating condition. This switch was not constructed.

Q. The switch was not constructed?

A. No, sir, this switch was not constructed.

Q. Now this map, how far is it from the west head-block of the side-track, back to that bridge. Tell us in the nearest hundred feet if you can.

A. Twelve hundred fifty feet.

(Testimony of J. M. Hanley.)

Q. Just a second. Take that—take it from the head-block to the west end of the switch?

A. To the west end of that switch is seven hundred eight feet.

Q. Now unrolling the rest of this map for a ways—

JUROR.—How far is that head-block you speak of there, from the station?

A. This head-block from the station is—

JUROR.—The head-block you *are* referred to there.

A. Eight hundred feet, approximately eight.

JUROR.—I did not get the distance from the block to the switch.

A. Eight hundred forty-seven feet from that east end of the switch to the head-block; eight hundred forty-seven feet from the switch to the head-block.

Q. Unrolling this map, down here at the very extreme end of it is a curve.

A. Yes, a two-degree curve.

Q. From the point where the track begins to curve, up to the head-block on this map—this point where the track begins to curve is labeled Station 28437 plus 96. From that point up to the depot, is there any curvature in the track? [208—168]

A. None whatever.

Q. What is the distance from that point where the curvature begins, up to the head-block?

A. Well, it is approximately two miles. You want the exact distance?

(Testimony of J. M. Hanley.)

Q. The nearest thousand feet, is enough.

JUROR.—Where is the siding—

COURT.—We will get that in a minute.

A. Nine thousand four hundred twenty-five feet from the east end of the curve to the head-block of the passing track.

COURT.—One of the jurors wants to know where that passing track is.

A. That passing truck is the middle track right in here. This is the industry track; there is the passing track; here is the main line.

COURT.—Does that passing track leave the main line at the place you call the head-block?

A. Yes, might be easier if we called it the switch; we call it the head-block.

COURT.—How far does the passing track extend east?

A. Sixty-five hundred feet from here to the end of the passing track.

Q. This map does not show the end of the passing track.

A. No, sir. Tangent track practically four miles from the depot to the curve.

COURT.—Where was Mr. Shellenbarger found?

Mr. ROCKWOOD.—This man can't say; he was not there. This is just the man who drew the map.

Q. I want you to explain a little more about that new construction. You say new construction work, or new grade, with track [209—169] rails on it, began about here, between the station and the head-block of the passing switch. Is that right?

(Testimony of J. M. Hanley.)

A. Yes, sir, that is correct.

Q. And how far west did the building of the new and parallel construction extend?

A. To the point of this curve here, and then the Saco turn; turns north.

Q. In other words, the new construction work would parallel all the way down here to the point we refer to where the track begins to curve?

A. Yes, sir.

Q. And then new construction work bore off to the north? A. Turned north, yes.

Q. What kind of material was in that fill?

A. Soft sandy clay material that had been hauled in there.

Cross-examination.

(Questions by Mr. DIBBLE.)

Am I right in saying this is the east end of this map? A. This is correct.

Q. And only one line of railroad there?

A. Was at that time, in July 1928.

Q. Just one line running from here clear on to where the siding is?

A. Yes, sir, except here; there is a stockyard, and a stockyard track in there. But from this point, clear to here, was only one track at that time in operation.

Q. That track I am pointing to, this track?

A. That is the main line.

Q. These two lines are right of way lines?

A. Yes, sir. [210—170]

Q. And Saco is which side of the track as you go east? A. Saco is right here.

(Testimony of J. M. Hanley.)

Q. Would be on the left-hand side of the track, wouldn't it?

Mr. ROCKWOOD.—North of the track.

A. To the north of the track, yes.

Q. If the train were going east, Saco would be to the left? A. Yes, sir.

Q. This siding, is that where it starts?

A. Yes, sir.

Q. And goes off this way?

A. You see three tracks; here is one track, this is an industry track.

Mr. ROCKWOOD.—The most southerly track is the industry track?

A. Yes, the passing track is the middle track.

Q. The middle track? A. Yes, sir.

Q. And if a train were going east there, and wanted to take the siding to allow a train to go west, they would go on this middle track, right here where I am pointing. Would go in there?

A. Ordinarily they would.

Q. Were there two tracks there at the time, two passing tracks?

A. There is two passing tracks here. Here is the other passing track over here; but this is not a passing track, this is an industry track; this is not used for passing trains.

Q. If a train were going east and wants to take the siding, would go in on that middle track?

A. Yes, sir.

Q. They have to stop to take the siding, don't they? A. Yes, sir.

(Testimony of J. M. Hanley.)

Q. And do they have to turn a switch, or something? [211—171] A. Yes, sir.

Q. Would have to come to a complete stop right in here some place?

Mr. ROCKWOOD.—I don't think this witness can say.

COURT.—He is not an operator of trains.

Q. Now this construction work extended from where? I didn't quite get that. Just where was the work going on?

A. Right in here, paralleling this main track.

Q. Where? A. On that side.

Q. And was there a slow order in effect?

A. Yes, there was.

JUROR.—In a train coming from the west, as this one was, taking a siding, would the train be to the right of the main line, or to the left?

A. It would be to the right if it were on the track going east.

JUROR.—This industrial track was where?

A. That is still further south, the industrial track.

JUROR.—The main line was to the left of both of them?

A. On the north.

COURT.—Do you know anything about the signal—I call them signal posts, I don't know what you call them?

A. Yes, block signals.

COURT.—Well, the station where warning is given to approaching trains?

A. Yes, sir.

(Testimony of J. M. Hanley.)

COURT.—Where is that located here? On which side of the track?

A. On account of the construction the signal on this side had been removed. Ordinarily the signals would be a hundred and fifty [212—172] feet from this switch.

COURT.—Where was it, do you know, at that time?

A. It was a hundred fifty feet from this switch.

COURT.—On which side of the main track?

A. On the south side.

COURT.—Signals on the south side?

A. Would be one signal on each side; one for the west-bound train, one for the east-bound.

COURT.—The west-bound train, I have reference to.

A. The west-bound train signal would be north of the track.

COURT.—So that the crew of a train approaching the station—or if a station-master had orders for a train, he would put the signals advising the train, on the north side. Is that right? Is that the way it is arranged?

A. No, sir, it is controlled by automatic drop signals.

Mr. ROCKWOOD.—I think the Judge is asking about what we call an order board.

A. The order board would be right at the depot here, right in front of the depot, if you mean order board.

Mr. ROCKWOOD.—That is a manually operated board, operated from the inside of the depot.

(Testimony of J. M. Hanley.)

A. Yes, that is operated inside the depot.

COURT.—Is that on the north or the south side of the main track?

A. It could be either.

COURT.—In this instance, in 1928.

A. In 1928 it would be the north side of the main line, right in front of the depot, right on that platform of the depot.

COURT.—Just what do you mean by signal board?

A. A train order board that has two arms that the operator [213—173] indicates to the train crew whether he has orders for them.

COURT.—That is some kind of a—

A. It is a semaphore set up on iron posts, and two arms.

COURT.—That is what I was asking about when I referred to the signal board.

Q. (DIBBLE.) Where would the switch be located that the brakeman or whoever it is, would turn to get the train off the main line onto the side track?

A. What was that again?

Q. Where would the switch be located—where was it located, on which side of the track, the right-hand side as you went east, or the left-hand side?

A. Might be on either.

Q. What was it? A. It was on this side.

Q. On the right-hand side?

A. It would be on the south side of the track.

Q. If a train were coming this way, coming along the main line here towards the east, why the switch

(Testimony of J. M. Hanley.)

that they would turn to throw it from the main line onto this— A. Would be on the right side.

Q. Was on the right-hand side of the train?

A. Yes, sir.

Q. And that is where the brakeman, or whoever it was that would turn it, would get off. He would get off the right-hand side?

A. Not necessarily.

COURT.—He is not the operator; he only drew the map.

Mr. ROCKWOOD.—I object to that.

COURT.—Only the physical location.

Q. But that is where it was physically located at this time, [214—174] on the right-hand side?

A. Yes, sir.

Q. And this slow order. How far back did that extend?

A. I don't know, but that would be controlled by the train order; the train crew would have that.

Q. And if you ran clear down here—if the improvement ran clear down here as indicated, would be likely to cover down here?

COURT.—Ran down two miles, a mile and a half.

A. Yes, sir, just about that.

JUROR.—Were there lights on that switch at the west end?

A. Yes, sir.

JUROR.—That you used to operate that switching track?

A. Yes, sir.

JUROR.—Where was this light, this signal that was not being used because of the construction?

(Testimony of J. M. Hanley.)

A. That was on the north side of the track.

JUROR.—About where from that switch?

A. About a hundred fifty feet.

JUROR.—West?

A. West.

JUROR.—That had nothing to do with the main line at all.

A. No, sir, that would be for the train coming from the opposite way.

JUROR.—That signal was not being used?

A. No, sir, that was taken out.

JUROR.—On account of the construction?

A. Yes, sir.

Witness excused. [215—175]

TESTIMONY OF ROBERT H. SAWYER, FOR DEFENDANT.

ROBERT H. SAWYER, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Sawyer?

A. Portland, Oregon.

Q. And by whom are you employed?

A. Southern Pacific Railway.

Q. And what is your capacity with them?

A. Locomotive engineer.

Q. Were you a passenger on the Knights Templar train on the 13th of July, 1928? A. I was.

(Testimony of Robert H. Sawyer.)

Q. What was the first intimation you had that an accident had happened?

A. When the brakeman came through the train and said that a Sir Knight had fallen off.

Q. Speak up louder, please.

A. When the brakeman came through the train and said a Sir Knight had fallen off the train.

Q. Now, had that—when you heard the brakeman make that remark where were you in the train?

A. I was sitting in the observation-car, in the smoking compartment of the observation-car.

Q. Prior to the time that the brakeman made that remark, do you recall how the train was being operated?

A. Well, to my notion it was being operated in a very satisfactory [216—176] manner.

Q. Do you recall any jars, or lurches, or unusual swaying of the train at the time immediately before the brakeman made that remark? A. No, sir.

Q. After the brakeman made that remark, tell what you did?

A. Well, I immediately arose and started for the rear portion of the observation-car to get off and see if I could go back and probably find Mr. Shellenbarger. By the time I got to the rear part of the car they had made one stop and immediately gone, and I pulled the whistle-cord to stop the train again so that I could get off.

Q. You pulled a signal? A. Yes, sir.

Q. After you blew the signal what happened to the operation of the train?

A. Well, there was quite a sudden jar then, be-

(Testimony of Robert H. Sawyer.)

cause in moving only about a car-length, you will naturally get slack taken out of your train, and when you make the application of the brake, the slack will naturally run in on the rear end before the air sets on it.

Q. Now, tell us so it will be perfectly clear, Mr. Sawyer, just what you remember as to the movement of the train from the moment that the brakeman said that a Sir Knight had fallen from the train until it stopped after your signal; what did the train do? How fast did it go? Was the motion continuous or what did it do? Do you get my question?

A. Well, I believe, I won't be positive, but I believe it come to a momentary stop, and then he started again. That was the reason I blowed the whistle signal, because I knowed [217—177] I couldn't get off with it moving, on account of being dark. I didn't want to take a chance of probably getting hurt.

Q. After it came to a stop, after your signal did you get off the train? A. Yes, sir.

Q. What was the position of the train at that time, was it on the main line, or was it on the sidetrack? A. It was on the main line.

Q. Where did you go then?

A. I immediately started back along the main line to where Mr. Shellenbarger fell off.

Q. Did you got back to where he was hurt?

A. Yes, sir.

Q. Did you observe his condition at that time?

A. Well, there was—Mr. Stewart was holding

(Testimony of Robert H. Sawyer.)

him; I believe had his arms under his shoulders and holding him up.

Mr. ROCKWOOD.—I guess there is not dispute about that. They all said he was unconscious; I don't want to waste the time of the court going over that again.

Q. After you had been back there *do* you back up to the train?

A. I came back on the automobile. I helped carry Mr. Shellenbarger across the drain ditch, along where the new construction work had been going on, and over the fence and helped put him in the automobile.

Q. When you got back to the train, where was the passenger train at that time?

A. It was on the siding at Saco.

Q. Where with respect to the station at Saco?

A. Well, I should judge the head end stopped some place near the depot. I wouldn't be positive about that. [218—178]

Q. It was up there at the depot? A. Yes, sir.

Q. From the time you got off the train until the time you got back on it at Saco, do you know anything about what happened to the operation of the train itself? A. No, sir.

Q. Do you know anything about the condition of the vestibule at the time this accident is said to have happened? A. No, sir, I don't.

Cross-examination.

(Questions by Mr. DIBBLE.)

You were employed,—you are employed by the

(Testimony of Robert H. Sawyer.)

Southern Pacific Company at this time, are you? As a locomotive engineer?

A. No, sir, back-firing an engine at present.

Q. But you have been an engineer?

A. Yes, sir.

Q. How long have you been in the service of the Southern Pacific Company?

A. Almost eighteen years.

Q. And you were riding in the smoking compartment of the observation-car? A. Yes, sir.

Q. And was that towards the front of the observation-car? A. It is about the middle of the car.

Q. It is about the middle? A. Yes, sir.

Q. And were you sitting down or standing up?

A. Sitting down.

Q. And you were sitting down at the time the brakeman came through? [219—179]

A. Sitting down.

Q. And you were sitting down at the time the brakeman came through? A. Yes, sir.

Q. And you had been sitting down all the time as you rode along there before that, had you?

A. Well, I had been in the observation-car, I think, probably thirty or forty minutes.

Q. And had you been sitting all that time?

A. Yes, sir.

Q. Sitting down there for half an hour?

A. Yes, sir.

Q. Before the brakeman came through there?

A. Yes, sir.

(Testimony of Robert H. Sawyer.)

Q. What were you during that time doing,—do you remember?

A. We were just having a friendly chat there amongst ourselves; were some seven or eight of us sitting there.

Q. You were not paying any particular attention to the movement of the train, were you, at that time? A. No, sir, none of us were.

Q. There was no reason why you should be doing so? A. No, sir.

Q. You were riding along there with some of your friends? A. Yes, sir.

Q. In the smoking department, and you were not keeping any particular lookout to see just how the train was being operated, were you? A. No, sir.

Q. Now, you say that the brakeman said that a Sir Knight had fallen from the train. That is what he said, didn't he? [220—180] A. Yes, sir.

Q. You are sure about that? A. Sir?

Q. He didn't say he had walked off the train, did he?

A. He said that a Sir Knight had fallen off the train.

Q. Fallen off the train. Did he seem to be scared, excited? A. Well, he naturally would be.

Q. I am not asking you if he wouldn't; he was excited, wasn't he?

A. He naturally would be, in an accident like that.

Q. Just answer whether he was or not. And you

(Testimony of Robert H. Sawyer.)

are sure he said he fell from the train, he had fallen off the train?

A. I am positive that is what he said.

Q. Now, then, how fast would you say the train was going along there before the brakeman came in and said a Sir Knight had fallen off the train?

A. Well, that would be pretty hard to answer, sitting in the smoking department of the car.

Q. Well, you are an engineer, and you have been driving locomotives, haven't you? A. Yes, sir.

Q. You sit down when driving them, don't you?

A. In a locomotive cab it is altogether different than sitting in a passenger-car.

Q. That is probably true; but you could give us some idea, couldn't you, how fast the train was going before the brakeman came in and said a Sir Knight had fallen off?

A. They were slowing, so I don't know just exactly what speed they were making along there; previous to that I should judge [221—181] they had been making about thirty-five or forty miles an hour.

Q. Going right along? A. Yes, sir.

Q. Do you know anything about their having to make this siding? A. No, sir.

Q. You don't know anything about what the train's orders were? A. No, sir.

Q. And you were not paying much attention, then, to the movement of the train, were you?

A. No, sir.

Q. You weren't paying much attention to what

(Testimony of Robert H. Sawyer.)

the speed was, or the lurching, or jarring up, or anything of that kind? A. No, sir.

Q. No reason why you should? A. No, sir.

Q. And all you can say is, as you were sitting there before the brakeman came in and said a man had fallen from the train, you hadn't noticed anything? A. No, sir.

Q. And you were not paying any attention along this line at all? A. No, sir.

Q. And did you—when the brakeman came through the observation-car did he go to the back end then and get off the train?

A. Yes, he did.

Q. And when he got off was the train in motion, or had it stopped?

A. That I couldn't say; he got off before I did.

Q. The train was going when he got off, wasn't it?

COURT.—He said he couldn't say. [222—182]

Q. Couldn't say. Do you know when Mr. Stewart got off? A. No, sir, I don't.

Q. You don't know whether—do you know when Mr. Cornell got off? A. I do not.

Q. Was the train still or moving when you got off? A. Was standing still.

Q. Whereabouts was it? Can you show us on the map where the train was when you got off?

A. Well, I don't know as I could tell you exactly where it was.

Q. How far from Saco was it?

(Testimony of Robert H. Sawyer.)

A. Well, I don't know as I could tell you that, because it was dark.

Q. Had it gotten up to the station yet?

A. No, sir.

Q. Was it on the main line when you got off?

A. Yes, sir.

Q. Or had it taken the siding?

A. It was on the main line.

Q. It was on the main line? A. Yes, sir.

Q. And how far was that place where you got off, from the place where the brakeman came in and said a man had fallen off?

A. Well, I don't know, because they went—how many feet they did go after he came through the car until he got off the train.

Q. And about how far do you think it was? What I am trying to get at is, how far do you think the train traveled after the brakeman said that a man had fallen from the train? How far did the train travel from that time until it stopped and you got off it?

A. I wouldn't say that we traveled over an eighth of a mile. [223—183]

Q. An eighth of a mile. And is that the stop that you spoke of as a momentary stop, which you say you have a recollection of? A. Yes, sir.

Q. And that momentary stop, if there was one, occurred at least an eighth of a mile from the place where the brakeman came in and said a man had fallen from the train? A. Yes, sir.

(Testimony of Robert H. Sawyer.)

Q. And then was the train moved up the track further then after that to the siding?

A. Yes, sir.

Q. I suppose you were there when it was moved?

A. No, sir, I wasn't there when it was moved.

Q. You went back to where this man was?

A. Yes, sir.

Q. Did you assist in carrying him to the automobile? A. I did.

Q. Did you notice his head?

A. No, sir, I did not; it was dark, and the fellow that had the lantern went ahead of us.

Q. Did you know him? Did you know Mr. Shellenbarger?

A. I had known of him for a good many years.

Q. Were you personally acquainted with him at the time? A. No, sir, I was not.

Q. Did you know at the time you saw the man lying there, that it was this man? A. Yes, sir.

Q. You knew it was this man?

A. Yes, sir. [224—184]

Q. And he was unconscious, wasn't he, when you saw him? A. He was.

Q. And you rode with him in the automobile to Saco? A. Yes.

Q. Then I understand he was put on the train, and carried by the train on up to Glasgow. How far is Glasgow up from Saco? Do you know how far about it is? A. I don't know.

(Testimony of John Dannell.)

Q. It is not a great ways on up there, is it?

A. That I couldn't say.

Witness excused. [225—185]

TESTIMONY OF JOHN DANNELL, FOR DEFENDANT.

JOHN DANNELL, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Dannell, by whom are you employed?

A. Great Northern Railway.

Q. And what is your business with the Great Northern? A. Locomotive engineer.

Q. Were you the engineer in this Knight Templar special train on July 13, 1928, near Saco?

A. I was.

Q. Now, first, on the track west of Saco, for a stretch of three or four miles—I am not trying to fix it now by distance—but for that stretch west of Saco there was a slow order in effect at that time?

A. There was, for about two miles west—from Saco west.

Q. Now, do you have a recollection at this time of exactly what the terms of that slow order were?

A. No, I am not positive, but it seems to me it

(Testimony of John Dannell.)

was twenty or twenty-five miles an hour; it seems to me it was twenty, though.

Q. For passenger trains? A. Yes, sir.

Q. Beginning at a point about two miles west of Saco, near the stockyards. You are familiar with that location? A. Yes, sir.

Q. The map shows that is a tangent track. From there on in [226—186] tell us what you recall as to the operation of your locomotive and the speed at which you were going, and the signals, and the stops that you made.

A. Well, at the stockyards I had the train slowed down to about twenty or twenty-five miles an hour, and was proceeding at that rate of speed; when I came to within—just about a mile from Saco, I was pulled down by the signal cord, and I proceeded to stop, but I didn't have—it was to stop on one signal, but I didn't make emergency application; just made a gradual stop, and got down to just a little bit more than a quarter of a mile from the switch; that is, I was with the engine right on this bridge when I made this first stop.

Q. After you made that first stop then what did you do?

A. We waited until the brakeman showed up, the head brakeman, but he couldn't get up to the engine on account of this bridge, and we couldn't see anything on the left side that I know of; I don't remember whether the brakeman could see anything from—the fireman could see anybody on

(Testimony of John Dannell.)
the left side, or not; but I saw nothing in sight on my side; was about a minute, but we proceeded again and I not much more than got the train started to move when I was pulled down again, that is, that whistle signal, and I proceeded to stop again; but the train going at a slow speed, I probably stopped a little bit hard the second stop, because we only went about, I would say, two hundred feet on the second stop—when we made the second stop; and then the brakeman came up to the engine, that is, our head brakeman, and got on the pilot of the engine, and he says—

Mr. DIBBLE.—Just a moment; I object to what he said. [227—187]

Q. Don't tell what he said; just tell what you did.

A. When he got on the head end of the engine we proceeded again down to the station to head in, where we had to meet with No. 3, which was at this time about a quarter of a mile to the switch, and he threw the switch—

Q. Who threw the switch?

A. The brakeman threw the switch, got up on the engine, and while we was pulling in the clear I told him the whistle signal was blowing continuously, I think there is something wrong with it. So he said he would look over the signal line when we got in the clear; and he starts to walk back; and shortly after that someone came up and let us know there was a man fell overboard before we had stopped the first time.

Q. Up to that point—until you were on the pass-

(Testimony of John Dannell.)

ing track at Saco you had no information that a man had fallen off? A. No, sir.

Q. When you got just to the head-block there of the west switch, you stopped; was that an operating stop? How was the switch set there?

A. It was lined up to the main line, normal position, being set for the main line.

Q. That had to be opened up before you could go on the side-track? A. Yes, sir.

Q. Where did your engine stop after you got on this side-track?

A. We were with the engine about a hundred fifty to two hundred feet east of the station. [228—188]

Cross-examination.

(Questions by Mr. DIBBLE.)

How long, Mr. Dannell, have you been employed by the Great Northern Railroad?

A. Twenty-four years.

Q. And you live where? A. Havre, Montana.

Q. This slow order that you speak of, that existed, was that an order in writing? A. Yes, sir.

Q. And have you got a copy of it? A. No, sir.

Q. Has counsel got a copy of it?

A. I don't know.

Mr. ROCKWOOD.—No, I haven't. I wish I had; I overlooked that.

Q. Where did you get those orders?

A. From the dispatcher's office.

Q. Is that given to you before you start out on the run? A. Yes, sir.

(Testimony of John Dannell.)

Q. And you have that right with you, then?

A. Yes, sir.

Q. In the cab of the locomotive? A. Yes, sir.

Q. And you say that this slow order required you to go how slow through this construction work?

A. I don't remember positively now; it has been two years ago; but it seems to me between twenty to twenty-five miles an hour; either twenty or twenty-five.

Q. Is that the customary speed when going through construction work? [229—189]

A. Yes, sir.

Q. Let me ask you: Is the Great Northern Railroad—was it at that time operated under standard train rules? A. Yes, sir.

Q. That governed the Hill lines? A. Yes, sir.

Q. In other words, the Spokane, Portland & Seattle—

Mr. ROCKWOOD.—Just a moment; this man doesn't know the S. P. & S. rules.

Mr. DIBBLE. — This is cross-examination; I think he does; he can say.

Q. You have been an engineer for twenty-five years. Did you ever work for the S. P. & S.?

A. Engineer since 1913, seventeen years.

Q. But you are familiar with the train rules under which the Spokane, Portland & Seattle Railway operates? That is one of the Hill lines.

A. To this extent, that it is standard rules; but we have a Great Northern book of rules for the

(Testimony of John Dannell.)

Great Northern, and the S. P. & S. for the S. P. & S.

Q. You have the same standard rules that apply to the S. P. & S. and the Great Northern. That is true, isn't it?

A. Practically the same, I suppose; I haven't looked over the S. P. & S. rule book.

Q. But your understanding is that all of the Hill lines have the same standard operating rules?

A. I think so.

Q. And this slow order that you had there, could you tell from this map—could you show the jury here where that would be [230—190] that you would be required to slow down to twenty or twenty-five? A. Yes, sir.

Q. I wish you would do that.

COURT.—He said, about two miles back of the depot; he said two miles west of the depot; that would take it back to the curve, according to the testimony?

A. About at the stockyard, the stockyard switch.

Q. That is all right. That is two miles?

A. Well, approximately two miles.

Q. Two miles west of the depot then you should have the train slowed down to twenty or twenty-five miles an hour? A. Yes, sir.

Q. And then you should continue that two miles at that same speed?

A. Just about that, yes, as near as I could make that speed.

Q. Up to the end of the construction work?

(Testimony of John Dannell.)

A. Yes, sir.

Q. How fast were you going with the train before you came to that two-mile point?

A. Oh, I was going pretty—around forty-five or fifty miles an hour.

Q. How much?

A. Between forty-five and fifty miles an hour.

Q. Between forty-five and fifty. When did you know that you had to make this siding to allow the other train to go by?

A. We had a straight meet, so we didn't have any positive time to get there; but of course I figured on getting there so as not to lay them out any more than would be if had been on time.

Q. Didn't you have an order to go into the hole, as you call it? [231—191] A. Yes, sir.

Q. When did you receive that order to go into the hole at Saco?

A. At Malta. We left there about 9:55 I think it was.

Q. Do you remember—do you actually remember now—over two years since the accident occurred, you actually remember the slowing of the train down for the purpose of complying with that slow order? A. Yes, sir.

Q. Or do you just say that because there was an order to that effect? You remember you did slow it down? A. Yes, sir.

Q. And where did you slow it down?

A. So as to have it at that speed about the east switch of the stockyard.

(Testimony of John Dannell.)

Q. About two miles west of Saco?

A. Approximately so, yes.

Q. And then you said you got a signal. What kind of a signal was that you got? What kind of a stopping signal was it you got?

A. Two sounds of the air signal.

Q. Where was the train, would you say, at the time you got that signal?

A. About a mile from the station switch.

Q. About a mile from it? A. Yes, sir.

Q. So you were just about in the middle of this construction work? A. Almost so.

COURT.—That almost follows as a matter of fact, if it was two miles, and he was in the middle of it. [232—192]

Q. So that is a signal, Mr. Dannell, to stop the train? A. Yes, sir.

Q. For an emergency stop? A. Yes, sir.

Q. It wasn't an emergency stop, was it?

A. No.

Q. It wasn't the kind of a signal that would be given if a man had been thrown overboard?

COURT.—How does he know what kind of a signal would be given if a man were thrown overboard.

Mr. DIBBLE.—I don't know, your Honor.

COURT.—I know; but you say that is not the kind of a signal given if a man were thrown overboard.

Mr. ROCKWOOD.—I think that is immaterial, irrelevant and incompetent.

(Testimony of John Dannell.)

COURT.—I don't think any special signal in existence if a man were thrown overboard from a train.

Mr. DIBBLE.—I should think there would be; I think it would be a very humanitarian thing to have.

Q. I will ask you if there is any signal to stop the train when someone has been thrown from the platform? A. No, sir.

Q. Don't you have any kind of an emergency signal? For a matter of that kind?

A. No, sir, not that I know of; I know of none.

Q. And this signal you say you got one mile from Saco, what was that signal for you to do?

A. Stop at once.

Q. Stop at once? A. Yes, sir.

Q. How many cars were in that train?

A. Ten. [233—193]

Q. Including the engine?

A. No, ten cars and the engine.

Q. At the time you got that signal how fast were you going?

A. About between twenty and twenty-five; I don't remember exactly, but between that; twenty or twenty-five miles an hour.

Q. That was a mile west of Saco. How far were you from Saco when you brought the train to a stop in response to that signal?

A. It traveled more than a quarter of a mile. I was with the engine right on this bridge here that was mentioned.

(Testimony of John Dannell.)

Q. Did you stop the train as soon as you could.

A. Without making an emergency application, yes. Well not—I want to say I wasn't going to make a hard stop, not knowing there was any occasion for that; just a gradual good stop.

Q. How far did it take you to stop the train going twenty miles an hour, or twenty-five, what distance did that take?

A. Well, it was—I have no idea; I used a little over half a mile to make a stop, anyway. As I say, I didn't make an emergency stop, just a gradual heavy stop.

Q. You think it took you half a mile to make the stop? A. Yes, sir.

Q. Wouldn't that indicate, Mr. Dannell, you were going at a faster speed than twenty or twenty-five miles an hour? A. No, sir.

Q. Does it take half a mile to stop a train of ten cars and an engine?

A. No, sir, not if make a heavy stop.

Q. In what distance—

A. It would if going fifty miles an hour, but at twenty miles an hour it wouldn't take no heavy application to use half a mile to stop in. [234—194]

Q. It would take half a mile to stop if going at fifty miles an hour?

A. That would make a pretty hard stop, to stop in half a mile; awful hard stop.

Q. If going forty-five miles an hour, what would it take? Just about half a mile, wouldn't it?

(Testimony of John Dannell.)

A. Just take pretty hard stop, yes.

Q. Now, then, if going twenty to twenty-five miles an hour, what would be the shortest distance you could stop the train in?

A. Well, sir, you can stop awful quick.

Q. About how—

A. At twenty miles speed I should say in—well, I have—I couldn't tell you exactly, but I imagine a fellow could stop in about five hundred feet.

Q. About five hundred feet. If a train were going along at about twenty miles an hour, could stop in about five hundred feet, and you have no independent recollection at this time of just how fast the train was going through this construction work, have you?

A. About twenty or twenty-five miles an hour.

Q. But that is just because you had an order to go that fast? A. Yes, sir.

Q. If you had been a little behind you might have been going faster than that, might you not?

A. No, sir.

Q. Do you recall whether you were on time or not?

A. We had no schedule. All we had was a straight-meet with No. 3 at Saco.

Q. Were you sufficiently on time to make this siding to allow the other train to go? [235—195]

A. Well, we didn't have any too much time, for them to leave on time; but at the same time we could see them coming four or five miles; five miles; and no sight of their headlight, or anything.

(Testimony of John Dannell.)

COURT.—Is No. 3 scheduled to stop at Saco?

A. Yes, sir, they are.

Q. And were running close to time to get into the siding to let this other train pass? The time was getting short?

A. Was getting close to their time, yes.

Q. And to make this siding of course you have to throw a switch here? A. Yes, sir.

Q. And have to make an absolute stop there, to get in there? A. Yes, sir.

Q. And that switch is on the right-hand side of the track, is it, as you look towards Saco?

A. Yes, sir.

Q. And going east? A. Yes, sir.

Q. And would that be operated by the brakeman?

A. Yes, sir.

Q. Who would be on the rear of the train?

A. No, the brakeman at the head end of the train.

Q. Would be a different brakeman who would operate that switch? A. Two different, yes.

Q. Would the brakeman be on the head end who would take care of that?

A. Heading in, and the hind man if the hind end was going in.

Q. Had you been late on the trip anywhere? Were you late in getting out of Spokane?

A. No, I don't think so; was no schedule to the train, as far [236—196] as I know.

COURT.—No what?

A. No schedule to the train, as far as I know; just running extra.

(Testimony of John Dannell.)

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Were you the engineer on the train out of Spokane?

A. Yes—no, no, not out of Spokane; out of Havre.

Q. You went out of Havre? A. Yes, sir.

Q. I think it is quite clear the head brakeman would operate the switch on entering the passing track, is that right?

A. The head brakeman; yes.

Q. And who would operate the switch after you were in clear on the passing track?

A. The rear brakeman.

Q. Now, do I understand that when you gave these figures as to the distance in which a train could be stopped at various speeds, you said it could be—would have difficulty in stopping in half a mile at fifty miles an hour; that means what kind of a stop would be required to do that?

A. The heaviest service application without going into emergency.

Q. How would you describe the application of air which you made to stop the train when you got the first signal on this occasion?

A. Oh, just made about eight-pound reduction.

Q. Is that a light application, or a heavy application?

A. It is a light application. With the brake equipment we got now, it is about as light application as we can make and apply the brakes. [237—197]

(Testimony of John Dannell.)

Recross-examination.

(Questions by Mr. DIBBLE.)

And that light application would not jar the train so as to throw anybody? A. Yes.

Q. That light application would not? A. No.

Q. And you made a very light application at that time, and would not be enough to throw a man, or anything of that sort? A. No.

JUROR.—You said the switch was on the right-hand side of the track?

A. Yes, sir.

JUROR.—Which side would he be apt to open the door to close the switch?

A. We have positive instructions to go out the opposite side of the switch, and they always do it; so he was getting off the left side.

JUROR.—How far away was the next passing track west of Saco?

A. I think five miles; somewhere approximately five miles.

JUROR.—How much time did you have from there in to Saco?

A. Well, we didn't have any specified time; were just running extra.

JUROR.—I know; but you knew what time you passed that switch, don't you?

A. No, I don't, but I know we made a stop at Malta.

JUROR.—Did you have any slow orders beyond the stockyards west? [238—198]

A. No, sir.

(Testimony of John Dannell.)

JUROR.—Was that track level, or any grades?

A. Well, about four per cent; that is practically level.

JUROR.—Now, either you or one of the preceding witnesses spoke about a slack. I want to know if the Great Northern has a rule that you work steam when you are going to stop, until the stop is completed?

A. Why, yes, we use steam; not a wide open throttle, but we use steam.

JUROR.—The purpose of that is to avoid any shock?

A. Yes, sir.

JUROR.—Or jarring.

A. Yes, sir.

JUROR.—And were you working steam each time when you got the signal to stop?

A. Yes, sir.

JUROR.—Then under that theory there shouldn't have been any jolt to the train, should there?

A. No, sir.

Witness excused.

Recess until 2 P. M. [239—199]

Portland, Ore., Friday, Dec. 12, 1930, 2 P. M.

TESTIMONY OF ROSWELL A. C. BENNETT, FOR DEFENDANT.

ROSWELL A. C. BENNETT, a witness called by the defendant, being first duly sworn, testified as follows:

(Testimony of Roswell A. C. Bennett.)

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Mr. Bennett, you live in the city of Portland?

A. Yes, sir.

Q. What is your business?

A. Assistant Auditor of the United States National Bank.

Q. Were you a passenger on the Knight Templar special train in the month of July, 1928, when Mr. Shellenbarger was hurt? A. Yes, sir, I was.

Q. Where were you in the train when you received the first notice that you had, that anything had happened to Mr. Shellenbarger?

In the smoking compartment of the observation-car.

Q. What was the first notice you had that something had happened?

A. When the rear brakeman, I believe we call it, put his head through the door and into the smoking compartment, and said that one of the Sir Knights had just fallen off the train.

Q. Now, prior to that time, within the next three or four, or five minutes prior to that time, had you noticed anything about the operation of the train, in the nature of lurches, or jerks, or any swaying out of the ordinary?

A. The only thing that I noticed was the fact that the train had commenced to slow down just a little previous to that. [240—200]

Q. Do you know how much previous to that it was?

(Testimony of Roswell A. C. Bennett.)

A. It is difficult to judge time. It might have been a couple of minutes.

Q. After the brakeman made that statement, what did you do?

A. Well, it sort of stunned me for a moment. Then I got up and went out of the smoking compartment and towards the rear of that observation-car, and the train in the meantime had slowed down to such a point that a number of men had been dropping off and starting back up the track, and I was one of the last ones that went over the rear end and on up the track in search of Mr. Shellenbarger's body.

Q. Now, when you got off was the train still moving, or was it standing still?

A. It was still moving.

Q. How did you get off, do you recall? Did you climb over the rail, or go on some steps, or did you go off?

A. No, I just climbed over the tail end of it, was no steps open there. I just went out over that rail and down onto the right of way.

Q. How far back up the track did you go? Did you go back all the way to Mr. Shellenbarger?

A. No, I didn't quite reach the place.

Q. Then after you got back as far as you did go, what did you do?

A. I met some one of the men who was coming back towards the train, in order to notify the train that they had found Mr. Shellenbarger, and to return for him; and he stated that he was all in and

(Testimony of Roswell A. C. Bennett.)

couldn't go any further, and I volunteered to take the message back; so I immediately turned around and went back to the train.

Q. Did you walk up the track the whole distance to the train then? [241—201]

A. I ran and walked; yes.

Q. When you got back to the train where was the train?

A. The train had taken a siding there at what proved to be Saco, Montana.

Cross-examination.

(Questions by Mr. DIBBLE.)

Were you sitting down in the smoking compartment, or were you standing up?

A. I was sitting down.

Q. And about how long had you been seated there in the compartment before the brakeman came through and said that a Sir Knight had fallen?

A. From what time are you figuring?

Q. About how long before that had you been sitting there in the compartment?

A. Oh, I might have been there for half an hour or more, I couldn't say.

Q. And you were not paying any particular attention as to the movement of the train as you were riding along there, were you?

A. No, not in particular, except I did observe the fact that there had been a decided slowing up for two or three minutes prior to that.

Q. But you were just riding along there like an ordinary passenger might, and not paying any more

(Testimony of Roswell A. C. Bennett.)

observation about the movement of the train, than any other passenger would?

A. I wasn't paying any particular attention to it; I didn't have my mind on it in particular. I did not anticipate what was coming up.

Q. No, you had no reason to believe there was going to be any [242—202] accident, and you were not paying any attention to the movement of the train particularly, were you? A. No, sir.

Q. Are you clear in your mind as to what the brakeman said when he came and stuck his head in the compartment?

A. I sure am, on that point.

Q. And you are sure that he said that the Sir Knight had just fallen from the train?

A. Yes, one of the Sir Knights has just fallen off the train. That is the exact words, as I recall it.

Q. Those were the exact words?

A. I recall that very distinctly.

Q. He did not say a Sir Knight had walked off the train, or stepped off the train, did he?

Mr. ROCKWOOD.—I object to that; the witness has stated those were his exact words.

Mr. DIBBLE.—I believe on cross-examination I would have a right to go into that, after what you allege in your answer, as I understand.

COURT.—The brakeman said a Sir Knight had fallen off the train?

A. That was the exact words. He didn't say walked off, at all.

Q. Didn't say he walked or stepped off the train?

(Testimony of Roswell A. C. Bennett.)

A. No, just fallen off.

Q. And about how fast was the train moving, do you think, when you got off of it?

A. I couldn't tell you that.

Q. Well, about. Couldn't you tell?

A. Might have been five miles an hour, six, or seven. I haven't [243—203] the least idea. It had slowed down very decidedly by that time, because the air had been pulled on the engineer, and of course it had slowed down.

Q. About how long after the brakeman made this statement was it that you got off the train?

A. Why, things were moving so fast I couldn't tell; it might *have a* minute, two minutes, might have been three-quarters of a minute. They were going out there like a band of sheep, over the back of that train, to get back there.

Q. Had the brakeman gotten off before you?

A. Oh, yes, he just went right on and disappeared towards the rear end of the train as soon as he made that announcement.

Q. He wasn't the first one that got off, was he?

A. I wasn't there at the moment he got off, I can't say.

Q. And about how far back did you walk, do you think?

A. Well, it was dark, and I couldn't see; it might have been five hundred feet, or it may have been an eighth of a mile, I haven't the least idea.

Witness excused. [244—204]

TESTIMONY OF RICHARD W. CHALLANDER, FOR DEFENDANT.

RICHARD W. CHALLANDER, a witness called in behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live Mr. Challander?

A. Havre, Montana.

Q. And who do you work for?

A. Great Northern Railway Company.

Q. What is your business with the Great Northern? A. Locomotive engineer and fireman.

Q. Were you a member of the train crew on this Knight Templar Special that was in Montana, near Saco, on the 13th of July, 1928?

A. As to the date, I couldn't say, but I was on that particular train, yes.

Q. What was your business on the train?

A. Fireman.

Q. You were fireman? A. Yes, sir.

Q. In the locomotive? A. Yes, sir.

Q. Now, are you familiar with the stretch of track from the stockyard west of Saco, down to the station at Saco? A. Yes, sir.

Q. On this particular night, when this Knight Templar train was being operated, did you make—did the locomotive make—did the train make any stops between the stockyard and the station at Saco?

A. Yes, sir. [245—205]

(Testimony of Richard W. Challander.)

Q. Now, tell us what you heard in the locomotive and what the train did with respect to stops at the time the first stop was made, due to the fact that a communication whistle was sounded from someone on the train signalling?

A. The engineer to stop.

Q. What kind of a signal is that?

A. Two blasts of the air whistle.

Q. In your position as fireman, could you hear these two blasts? A. Oh, yes.

Q. When—what did the train do when these two blasts were heard? What did the engineer do with the train?

A. He made the usual reduction to stop the train.

Q. When you say "reduction" you mean manipulated the air brakes? A. Yes, sir.

Q. And when he stopped the train there where was the locomotive at?

A. You mean as to distance?

Q. At any point on the track. Can you identify its location by any objects on the track?

A. Well, we were possibly a mile from the Saco station, a mile and a quarter probably; somewhere in there.

Q. Are you familiar with a bridge over Beaver Creek? A. Yes, sir.

Q. Where was it stopped with respect to that bridge, do you remember?

A. The stop was made west of the bridge.

Q. When the train stopped what happened next?

A. I observed—that is, I looked back for sig-

(Testimony of Richard W. Challander.)

nals. There were no signals given on the left side of the train. I informed [246—206] the engineer to that effect.

Q. Then what did he do?

A. He also repeated that there were no signals on his side, and we proceeded ahead.

Q. What happened then?

A. There was a series of short blasts on the air-whistle.

Q. What did the engineer do then?

A. Made another stop.

Q. How far had you gone between the first stop and the second stop, do you remember?

A. A very short distance, possibly two or three coach lengths, some such matter.

Q. Then after that second stop what was the next movement of the train?

A. We proceeded—that is, the train was started ahead for the purpose of going in on the passing track.

Q. And were there any further stops or changes in operation of the train between that second stop and going on the passing track?

A. Well, sir, I don't recall whether we stopped at the switch, or slowly went through it when we came. I don't remember whether we were going slow enough that we hadn't to stop for the brakeman to get the switch or whether we were going at a slow speed.

Q. Then you headed in on the passing track?

A. Yes, sir.

(Testimony of Richard W. Challander.)

Q. Where was the train stopped?

A. In the clear of the main line.

Q. You didn't see this accident?

A. No, sir. [247—207]

Q. When did you first hear that an accident had happened?

A. After we were in the clear on the passing track.

Q. Did you leave your locomotive at any time?

A. I did.

Q. Where did you go?

A. Just back to the first car, I believe it was.

Q. Then what did you do?

A. I went back to the locomotive.

Q. And the train left town some time later?

A. Yes, sir, some time later.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the Great Northern Railway, are you? A. Yes, sir.

Q. How long have you been in the employ of the company? A. Since 1916.

Q. And did you always work as fireman?

A. No, sir.

Q. Have worked also as an engineer?

A. Yes, sir.

Q. And how long did you work as an engineer?

A. Since 1924.

Q. And in the ordinary operation of the train does the fireman ride on the left-hand side of the cab? A. It is his place, yes, sir.

(Testimony of Richard W. Challander.)

Q. That is where you were riding?

A. Yes, sir.

Q. And did the Great Northern Railway Company operate under what are known as standard regulations for the operation of trains? [248—208]

A. We are operating under our regular rules; yes, sir.

Q. Under the standard rules? A. Yes, sir.

Q. They have a book of rules for the different roads, don't they?

A. Well, I don't understand your question, sir.

Q. Doesn't the company issue a book of rules, or regulations, as to flagging and different details of operation?

A. They give us our rules; yes, sir.

Q. They are in the form of a printed book, are they not? A. Yes, sir.

Q. Those are what are known as standard operation? A. Standard operating rules; yes, sir.

Q. They apply, for instance, to all the Hill Lines, they have the same regulations, don't they?

A. I believe they do; there is a book of rules issued for the Great Northern, and one for the S. P. and one for the U. P., whatever road it might be.

Q. But the standard rules are all the same in all the books?

A. Well, I haven't read the other railroad books; I couldn't tell you that. But apparently from the word "standard" they would be.

Q. If you were shown the rule of the S. P. & S., for instance, in regard to flagging, you could tell

(Testimony of Richard W. Challander.)

if that is the same regulation as the Great Northern, couldn't you?

A. I believe I could, yes, sir.

Q. And as far as you know, the general rules are the same? A. As far as I know, yes, sir.

Q. I will ask you, Mr. Challander, to look at this book here, which is labeled "Spokane, Portland & Seattle Railway." That [249—209] is a part of the Hill System, of course?

A. I don't know.

Q. You don't know that? A. No, sir.

Q. There is a rule here; just read that, if you will. The one at the bottom of the page.

Mr. ROCKWOOD.—May I see what rule you are referring to? (Taking book.) It is not the same as the Great Northern rule, I can say that. I have the Great Northern book here, but that is not as the published Great Northern rule. Do you want the Great Northern rule book?

Mr. DIBBLE.—Yes, I would like to have them both.

COURT.—It was not on the S. P. & S. line, it was on the Great Northern Railway.

Mr. DIBBLE.—I will take the Great Northern; I have read the two rules.

COURT.—Yes, take the Great Northern.

Q. I will ask you then to refer to this Great Northern book, Mr. Challander, and read that Section 836 there. You need not read it out loud, just read that over to yourself, then I may compare them.

(Testimony of Richard W. Challander.)

A. You want me to read this to the jury, sir.

Q. No, no, just read it over to yourself, and satisfy yourself that was the rule. I will ask you to read that, and state whether or not that rule there was in effect on the 13th of July, 1928, at the time this accident occurred?

Mr. ROCKWOOD.—I will stipulate it was.

A. This book was in operation—this date in this book shows it was in 1921.

Mr. ROCKWOOD.—That book of rules was still effective. [250—210]

A. This was still effective in 1928.

Mr. DIBBLE.—We will offer that rule in evidence.

Mr. ROCKWOOD.—I have no objection to it being read, but I do not want the book out of my possession.

Mr. DIBBLE.—"The proper position for the rear passenger brakeman, while his train is in motion, is in the last car of the train, regardless of whether it is an observation, sleeping or private car, but during daylight hours he should get off the head end of such car. At night he must ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes." So that under that rule that has just been read to you, in the daytime—

COURT.—The rule speaks for itself.

Q. I believe that is true. Now, Mr. Challander, when these two blasts that you have described were given, where would you say the train was?

(Testimony of Richard W. Challander.)

COURT.—You mean the last?

Q. No, the first one; the first one.

COURT.—The first signal; I don't know whether he said two blasts the first time. That may be right.

Mr. DIBBLE.—I understood him to say two blasts. Am I right in that?

A. Yes, sir.

COURT.—The first signal you got was two blasts?

A. Yes, sir.

Q. That is the way I understood; I may be wrong. When you got those two blasts where was the train with respect to Saco, how far was it away from Saco? A. Possibly a mile out. [251—211]

Q. I didn't hear.

A. Possibly a mile from Saco.

Q. One mile from Saco? A. Possibly; yes.

Q. Were you aware of the fact there was a slow order in existence covering two miles west of Saco?

A. Yes, sir.

Q. You knew that that was the order?

A. Yes, sir.

Q. And then at the time these two blasts were given, you were passing through that construction area, weren't you? A. Yes, sir.

Q. And how fast would you say the train was going at the time the engineer was given these two blasts?

A. Well, at that particular time the engineer had previously reduced the speed of the train on

(Testimony of Richard W. Challander.)

that portion of the track covered by this order, and at that the time that the communication bells were given, we were possibly going eighteen or twenty miles an hour.

Q. Eighteen or twenty miles an hour?

A. To my recollection.

Q. Those two blasts that were given, what would that mean to an engineer? What would he be supposed to do on receiving those two blasts?

A. To stop.

Q. Would he be supposed to stop just as soon as he could?

A. Well, the rule says stop at once; he would use his judgment, I suppose.

Q. Now, with a train of eleven cars besides the engine, and this very train you had there, in what length of time would it take [252—212] to bring that train to a stop if it was going eighteen or twenty miles an hour?

A. All depends on the conditions.

Q. Conditions as they were there at that time.

A. That would all depend on the reduction made in the brake pipe.

Q. Assuming that the train was going eighteen or twenty miles an hour, they had made that reduction you speak of, and were actually going eighteen or twenty miles an hour, assuming that was true, in what length—

A. It is true, as far as my recollection is, that is, the speed.

(Testimony of Richard W. Challander.)

Q. Then couldn't you state in what length of time it would bring the train to a stop?

A. Well, an emergency stop would stop—an emergency stop differs from a service application in this respect. That the emergency stop applies the brakes as quickly and as hard as possible, and in a service stop it is generally a slow stop.

Q. This signal you got, was it an emergency or a service stop? A. A service stop.

Q. Wasn't a signal to stop at once?

A. One of the signals that we get to stop.

Q. That is, this two blasts?

A. That is to stop at once, sir.

Q. I thought I asked that—if that didn't mean for the engineer— A. To stop at once.

Q. When he got these two blasts—

A. To stop at once.

Q. If that didn't mean to stop at once?

A. Yes, sir.

Q. Now, I want you to tell the jury in what distance could he stop the train at once, if he was going at eighteen or twenty [253—213] miles an hour when he got these two blasts?

Mr. ROCKWOOD.—You mean if he made an emergency operation?

Mr. DIBBLE.—No, I mean under that very signal he is telling about.

Mr. ROCKWOOD.—How fast *could have* done it, or how far did it take him to stop.

Mr. DIBBLE.—Generally what length of time does it take to stop a train going eighteen or twenty miles an hour, this very train?

(Testimony of Richard W. Challander.)

Mr. ROCKWOOD.—I think the witness is entitled to know the circumstances to be assumed.

COURT.—Emergency stop or ordinary stop?

Q. I will withdraw that question, and I will ask this: Assuming, Mr. Challander, that you have this very identical train in which you were riding as fireman, consisting as I understand it of eleven coaches and an engine, that very train now, and on that very track, that has been testified to here in the testimony, and suppose that when you were on this main line here, at a point a mile and a quarter or such a matter from Saco, two blast signals were given to the engineer, meaning for him to stop the train at once, if that is what it meant, and suppose at that time he was going at eighteen or twenty miles an hour, how long would it take him to bring the train to this stop—what distance?

A. It depends on the application he makes.

Q. How soon could he stop it if he wanted to?

A. That I couldn't tell you; he could stop very suddenly if he wanted to. [254—214]

Q. In what distance could he stop if supposed to stop at once?

A. Well, sir, those hypothetical questions, I wouldn't care to answer; I haven't seen any figures or tests on that.

Q. Could he stop in five hundred feet?

A. Yes, sir.

Q. Could he stop in less than five hundred feet?

A. Probably.

Q. How much less? A. I don't know.

Q. Wouldn't take half a mile to stop, would it?

(Testimony of Richard W. Challander.)

A. If he didn't want to take half a mile, no.

Q. Suppose were going fifty miles an hour, and got these two blasts to stop at once, what distance would it take to bring the car to a stop?

Mr. ROCKWOOD.—I don't think that is competent. No evidence going at fifty miles an hour.

Mr. DIBBLE.—Evidence going half a mile before stopping and I have a right to claim from that that the speed of the train was greater than what the witness testified.

COURT.—He can answer. Answer the question if you can.

A. Ask the question again, please.

COURT.—How long would it take to stop a train going fifty miles an hour?

A. All depends on conditions and the application made.

Q. Take the conditions that existed at this time, we inquired about?

A. How long would it take to stop it?

Q. Yes, going fifty miles an hour?

A. I don't know.

Q. Why? [255—215]

A. Because I have no test figures, never witnessed a test on how long it would take to stop a train going fifty miles an hour.

Q. Have you ever ridden on a train going that fast? A. Yes, sir.

Q. When called on to stop suddenly?

A. Yes, sir, I have.

Q. Can't you, from your experience as a fireman and engineer, give the jury some idea of how long

(Testimony of Richard W. Challander.)

it would take to stop a train of eleven cars and an engine when going at fifty miles an hour?

A. As I said before, it is a hypothetical question. Depends on the reduction made by the engineer from the brake pipe and the pressure conveyed to the brake cylinder how long it will take to stop the train.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, in answer to a question, when you said that the train going at eighteen miles an hour on this stretch of track, with conditions as they were at the time could be stopped in five hundred feet or such, what kind of application of air would be required to stop in that distance?

A. Emergency application.

Recross-examination.

(Questions by Mr. DIBBLE.)

How many blasts do you give for service application? A. How many blasts?

Q. Yes. A. There is no such signal. [256—216]

Q. There is no such signal?

A. No, sir, not to my knowledge.

Q. What kind of a signal was given when you *say were* signaled the second time?

A. Just a series of blasts; didn't mean anything.

Q. That wasn't given by any train man apparently?

A. Well, the signal—on any occurrence of that

(Testimony of William McCloud.)

kind, you would generally lay to some leakage in the line causing the bell to operate.

Witness excused. [257—217]

TESTIMONY OF WILLIAM McCLOUD, FOR DEFENDANT.

WILLIAM McCLOUD, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. McCloud?

A. Havre, Montana.

Q. And you work for whom?

A. Great Northern Railway Company.

Q. What is your position with the Great Northern? A. Brakeman.

Q. Were you a member of the train crew of this Knight Templars Special near Saco, on the 13th of July, 1928? A. Yes, sir, I was.

Q. What was your position in the train crew?

A. Forward brakeman.

COURT.—Where was your station? You say forward brakeman; what does that mean?

A. He works the head end of the train, forward in the train.

COURT.—Any particular car you are to remain in?

A. I was riding in the baggage-car.

Q. On this stretch of track, from the stockyards

(Testimony of William McCloud.)

west of Saco into Saco, you say you were riding in the baggage-car? A. Yes, sir, I was.

Q. Do you remember a stop of the train at any time in that stretch before you reached the station at Saco? A. Yes, sir.

Q. Where did that stop occur?

A. On the bridge, about a quarter of a mile west of the switch leading to the east-bound passing track. [258—218]

Q. Prior to that stop did you notice any rough handling of the train? A. I did not.

Q. When the train stopped that time, what did you do?

A. I started to get down from the baggage-car just when he stopped; then he started up slowly.

Q. How far did he run after the first stop?

A. After the first stop on the bridge?

Q. Yes.

A. I would say he ran probably a hundred and fifty feet until he—

Q. Now, it has been testified that the train eventually got on the side-track there at Saco; were you with the train when it got on the side-track?

A. When it got on the switch?

Q. When it got onto the side-track.

A. Was I on the train?

Q. Yes. A. No, sir, I was on the engine.

Q. Tell us now from the time of that second stop until it got on to the side-track what you did with respect to the operation of that train, and what the movement of the train was.

A. When he made the second stop I left the bag-

(Testimony of William McCloud.)

gage-car and went on up to the engine and got on the pilot, that is the front end of the engine; rode it up until he made the third stop at the switch, where I got off and lined up the switch to enter the passing track, and I waited and looked at my switch point; when we pulled out I boarded [259—219] the engine, and rode from there on in, on the engine.

Q. When did you first hear that an accident had happened?

A. When I was along about halfway back over the train.

Q. You say when halfway back. After the train got on the passing track what did you do? Where did you go? What did you do?

A. When we got in on the passing track, I stepped down off the engine, looked towards the rear and saw that the switch was still lined up for the passing tract. I started back towards the rear of the train to line up the switch for the main line, so Number Three would not run through the switch.

COURT.—About halfway back on that trip that you heard of the accident, was it?

A. Yes, sir.

Q. Did you go back to the rear end of the train to line that switch? A. I did.

Q. Was the rear brakeman there at that time?

A. No, sir.

Q. And you heard of the accident when you were about halfway back on that trip? A. Yes, sir.

Q. Do you remember after that first stop west of Saco, and after the train had started up, do you re-

(Testimony of William McCloud.)

member what kind of a stop the engineer made next? Was it a smooth stop, or a rough stop, or what? A. It was not a rough stop, no, sir.

Q. At the time he made that second stop where were you actually standing or sitting, in the car or on the ground? [260—220]

A. I was standing in the baggage-car door when he made the second stop.

Q. Do you know how fast the train was moving just prior to the first stop?

A. Prior to the first stop?

Q. Yes.

A. Well, I would judge from the stockyard, that is two miles west to half a mile west of the bridge, he was traveling about twenty miles an hour.

Q. How would you describe the first stop he made—what kind of a stop was it?

A. Was a very smooth stop.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the company, the Great Northern Railway Company, are you?

A. I beg pardon?

Q. You are still in the employ of the Great Northern Railway Company, are you?

A. Yes, I am.

Q. And your home is in Montana?

A. Yes, sir.

Q. And how long have you worked for the company? A. A little over twenty-five years.

Q. Have you always worked as a brakeman?

(Testimony of William McCloud.)

A. Yes, sir.

Q. Have you ever acted as an engineer?

A. No, sir.

Q. Or a fireman either? A. No, sir. [261—221]

Q. And at the time you were on the train immediately before the accident were you in the baggage-car? A. Yes, sir.

Q. What were you doing, do you remember?

A. In the baggage-car?

Q. Yes.

A. I was standing up in the baggage-car.

Q. Were you performing any work of any kind?

A. Well, just your usual duty of brakeman, standing there, is all until there was something to do; nothing to do in the baggage-car at the time.

Q. You were in the body of the car, were you?

A. Right near the door, yes.

Q. Were you paying particular attention to whether the train was roughly handled or anything?

A. I was, yes.

Q. Why?

A. I was paying particular attention because we had a meet on this train number three at Saco; particularly watching where we were at and how the train was handled.

Q. Were you worried about whether you would be able to clear it or not?

A. No, sir, I was not worried because we had a positive meet on the train there.

Q. You had an order to give that other train the right of way, didn't you?

(Testimony of William McCloud.)

A. We had an order to take the siding there for number three; positive meet of number three; number three couldn't leave Saco until we arrived; positive meet.

Q. And you were paying particular attention, were you, to [262—222] the movement of the train as to whether being roughly handled or not?

A. I was, yes, sir.

Q. And the only reason for that was because you had to make this clearance?

A. Well, I usually watch the movement of the train when I am on duty.

Q. Why do you do that?

A. That is part of our duties, to watch the movement of the train at all times.

Q. Did you ever notice these trains swaying and lurching at other times?

A. I didn't notice this one at this particular time.

Q. At any other times, did you ever notice the train roughly handled? A. No, sir.

Q. Never did see a train roughly handled which you rode on? A. No, sir.

Q. And you have been railroading twenty-five years? A. Twenty-five years.

Q. And during that time you have never been on the train where it was roughly handled?

A. Not that I could say was roughly handled.

Witness excused. [263—223]

TESTIMONY OF H. R. SPOONER, FOR DEFENDANT.

H. R. SPOONER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Spooner?

A. Havre, Montana.

Q. In July, 1928, whom did you work for?

A. Great Northern Railway Company.

Q. What was your position at that time with the Great Northern Railway Company?

A. I was conductor.

Q. Were you a member of the train crew of this Knight Templars Special, near Saco, Montana, on the evening of July 13, 1928? A. Yes, sir.

Q. What were your duties in the crew?

A. Sir?

Q. What were your duties on the train?

A. I was conductor of the train.

Q. Are you familiar with that stretch of the track from a point near the stockyard, west of Saco, into the station at Saco? A. Yes, sir.

Q. During that—while the train passed over that stretch of track was there any stop of the train, before it reached the station at Saco? A. Yes, sir.

Q. Where were you riding at the time of that stop? A. In the baggage-car.

Q. Was any other member of the train crew with you A. Yes, sir. [264—224]

(Testimony of H. R. Spooner.)

Q. Who?

A. The head brakeman, Mr. McCloud.

Q. Prior to the time of the stop which you refer to, and if there were more than one, I am referring now to the first stop, was there any rough handling of the train that you were aware of?

A. No, sir, there was not.

Q. Do you know how far the train was, the head-end of the train was from the Saco station at the time of that stop you have referred to?

A. Well, about half a mile, I would say.

Q. After he made the first stop were there any other stops between there and the station at Saco?

A. Yes, sir.

Q. When was the next stop?

A. Well, it is a very short distance; the train just nicely got started and then stopped again.

Q. How far had it gone after the first stop until it stopped the second time?

A. Well, I wouldn't say over a hundred feet, something like that.

Q. What kind of a stop was the second stop; was it a smooth stop, or a rough stop?

A. Well, it wasn't what I would call a rough stop, although it was rougher than the first one was.

Q. Rougher than the first one? A. Yes, sir.

Q. Now after that second stop was there any further stop between that time and the time the train was on the passing track?

A. Just when we stopped to open the switch. [265—225]

Q. Were you on the train all during this time?

(Testimony of H. R. Spooner.)

A. During this specified time?

Q. Yes.

A. I was in the baggage-car all the way.

Q. You remained in the baggage-car until you got to the passing track? A. Yes, sir.

Q. What did you do then?

A. Well, I was watching back to the rear and saw the switch wasn't closed, so when I came down on the ground to see what was the reason the flagman didn't close the switch, and about that time someone informed me that one of our passengers had fallen off the train.

Q. Of course, you didn't see the accident?

A. No, sir.

Q. And you didn't learn of it until that time?

COURT.—By the flagman you mean the rear brakeman?

A. Yes, sir.

Q. And you didn't learn of the accident at all until after you were on the passing track and off the train? A. No, sir.

Q. Prior to this first stop that you have referred to, what was the speed of the train?

A. I would say around twenty or twenty-five miles an hour.

Q. What kind of a stop was that first stop?

A. Ordinary service stop.

Q. You have had a good many years experience in railroading, haven't you? A. Yes, sir.

Q. Are you familiar with the practices on the Great Northern [266—226] as to the duties of

(Testimony of H. R. Spooner.)

the rear brakeman in getting on and off the trains, passenger trains? A. Yes, sir.

Q. Will you tell us what the practice on the Great Northern was at this time?

Mr. DIBBLE.—Just a moment; that is objected to, if the Court please, for the reason that the rule governing it is in evidence.

COURT.—Getting off and on trains?

Mr. DIBBLE.—Yes.

COURT.—Is there a rule for getting on and off trains?

Mr. DIBBLE.—Yes, your Honor.

Mr. ROCKWOOD.—That is not quite correct. As a matter of fact they may have been violating the rule. I am asking what the practice was, not the rules.

COURT.—He can answer.

Q. What was the practice in getting on and off trains for the rear brakeman?

A. During the hours when the passengers were in the observation-car, the brakeman is required to get on and off the head-end of the car, and ride in the forward end of the car as much as possible.

Cross-examination.

(Questions by Mr. Dibble.)

Now, then, Mr. Spooner, this train was governed, as far as the movements of the rear brakeman were concerned by this rule I have read here, Rule 836?

A. Yes, sir.

Q. That is the standard rule governing the operation of trains? A. Yes, sir. [267—227]

(Testimony of H. R. Spooner.)

Q. Now isn't it true, Mr. Spooner, that this getting on and off of the front end of the observation car, under this rule, applies to the daytime only?

Mr. ROCKWOOD.—If your Honor please, I think that is argumentative. The language is in the record, and I don't think this witness should be required to interpret the language.

Mr. DIBBLE.—I am perfectly willing to leave the written rule in, but counsel saw fit to say they may have violated the rule.

COURT.—You are asking him to interpret the rule now.

Mr. DIBBLE.—Yes.

COURT.—It is not necessary for him to do that.

Q. Now I will ask you if this was not in effect at the time, that during the daylight hours, the brakeman, the rear brakeman we call him, should get off the head end of the car? A. Yes, sir.

Q. That was the established rule? A. Yes, sir.

Q. And that was because during the daytime the passengers might be on the rear of the observation-car observing the scenery and watching the country as they went along with the train? A. Yes, sir.

Q. And isn't it the idea that in the daytime, when the passengers might be out there, you would not want to discommode them by getting off the end?

A. Yes, sir.

Q. So you should use the front end of the observation-car. That is true, isn't it?

A. Yes, sir, that is it. [268—228]

Q. And that is the rule in the daytime?

(Testimony of H. R. Spooner.)

A. Yes, sir.

Q. And this accident occurred around about what time of the night? Somewhere around about ten thirty, wasn't it? A. About ten thirty, yes.

Q. And the rule there would be—wasn't this rule in effect here: "At night,"—referring to the rear brakeman—"he must ride in the rear end of the car, and must have near at hand necessary flags, lanterns, fuses and torpedoes." That was in effect at the time? A. Yes, sir.

Q. And you don't know of your own knowledge where the rear brakeman was riding, because you were not back there? A. No, sir, I was not.

Q. But, if he was riding in the back end of the coach just ahead of the observation car, he was there in violation of this rule I have read.

COURT.—That is asking him for a conclusion.

Mr. DIBBLE.—Yes, it is. He has already answered.

COURT.—You can argue that to the jury just as well as to ask this man about it.

Mr. DIBBLE.—I thought it might be cleared.

Mr. ROCKWOOD.—Do you want a little argument now?

Mr. DIBBLE.—No, I think I can get along.

Mr. ROCKWOOD.—I have some things to say about it.

Q. Now, Mr. Spooner, how long have you been in the employ of the Great Northern Railway Company?

A. I was in their employ thirty-one years about.

(Testimony of H. R. Spooner.)

Q. And you are still in the employ of the company? [269—229]

A. No, sir, not right now I am not.

Q. How long since you quit work for the Great Northern? A. A little over a year.

Q. Are you retired now, or working for some other line?

A. Well, I am practically engaged in the grocery business with a son-in-law of mine.

Q. Where do you live Mr. Spooner?

A. Havre, Montana.

Q. Now then, you had worked as a conductor for twenty-five years, do you mean?

A. Well, I was brakeman and conductor thirty-one years on that particular division.

Q. At this particular time you were in the baggage-car, were you with the man just on the stand?

A. Yes, sir.

Q. You were not paying particular attention, were you Mr. Spooner, as to whether the car was lurching or not, before you were notified that somebody had fallen off?

A. Well, I was paying particular attention to the movement of the train at all times, that was my business.

Q. But you were not paying particular attention to whether it was lurching or not, were you?

A. Yes, I was.

Q. Why were you?

A. Because I would have noticed it and known

(Testimony of H. R. Spooner.)

was something wrong, and it would have been necessary to report it.

Q. Do trains lurch at times?

A. They do sometimes; yes.

Q. And your experience during that twenty-five years—you have known lots of lurches on trains, haven't you? [270—230] A. Certainly have.

Q. And you have known lurches violent enough to throw somebody walking through the train, haven't you? A. Yes, sir.

Q. For instance, people would be thrown while walking from one vestibule to another, that has happened? A. Yes, sir.

Q. That would be what you boys call rough handling of the train? A. Yes, sir.

Q. Sometimes if you take a freight engineer and put him on a passenger train, is he a little bit rougher than the ordinary passenger man?

A. As a rule they are more careful.

Q. They are even more careful? A. Yes, sir.

Q. Do you remember who it was that told you that a Sir Knight had fallen off the train?

A. No, I don't; it was one of the passengers, one of the Sir Knights.

Q. One of the Sir Knights; was not the brakeman himself? A. No, sir.

Witness excused. [271—231]

TESTIMONY OF H. B. CLINKNER, FOR DEFENDANT.

H. B. CLINKNER, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Q. Where do you live, Mr. Clinkner?

A. Portland, Oregon.

Q. Who do you work for?

A. The Pullman Company.

Q. What is your position with the Pullman Company? A. Conductor.

Q. Were you on this Knight Templar special train which went through Saco, Montana, on July 13, 1928? A. I was.

Q. Were you on duty on that train?

A. Yes, sir.

Q. As a Pullman conductor?

A. I beg your pardon?

Q. As a Pullman conductor?

A. As a Pullman conductor.

Q. Prior to the time that the train got into Saco, Montana, where were you riding for the last two or three or four miles?

A. In the parlor-car, which was in the center of the train.

Q. What was going on in that parlor-car?

A. They were dancing.

(Testimony of H. B. Klinkner.)

Q. The people that were going to this convention had this for a dancing-car? [272—232]

A. The people on the party; yes, sir.

Q. Do you remember—were you conscious of any stops of the train before going onto the passing track at Saco? A. No, sir, I do not.

Q. Did you get off the train at Saco?

A. At Saco, when they made the final stop at the station.

Q. When did you first hear of this accident?

A. After stopping at the station.

Q. Well now, prior to that time of getting into Saco, was there any interruption to the dancing in that car? A. None that I noticed; no.

Q. Coming into Saco, was there any rough handling of the train, of which you were aware?

A. Not that I knew.

Q. That in any way affected the dancing in the car? A. No, sir.

Q. You didn't see the accident, of course?

A. No, sir.

Cross-examination.

(Questions by Mr. DIBBLE.)

You are still in the employ of the Pullman Company, Mr. Clinkner? A. Yes, sir.

Q. How long have you been in the company's employ? A. Eighteen and a half years.

Q. And at this time immediately before you heard that a man had fallen from the train, were you paying any particular attention as to whether the train was lurching or not? A. No, sir.

(Testimony of H. B. Clinkner.)

Q. You were not paying any particular attention to that? You [273—233] were in the parlor-car there?

A. I was in the parlor-car watching the dancing.

Q. Watching them trip the light fantastic?

A. Yes, sir.

Q. The Sir Knights were having a little pleasure there?

A. Yes; were, I imagine, about twenty-five or thirty in there dancing.

Q. With their ladies? A. Yes, sir.

Q. All having a nice time? A. Yes, sir.

Q. And you were riding along there, enjoying it along with them? A. Yes, sir.

Q. And were not paying any particular attention except to see how good they could dance?

A. It is my place to see that the people enjoy themselves on a trip of that kind.

Q. Sure.

Witness excused. [274—234]

TESTIMONY OF LEWIS B. BROWN, FOR DEFENDANT.

LEWIS B. BROWN, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. ROCKWOOD.)

Where do you live, Mr. Brown?

A. Havre.

Q. Montana? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. By whom are you employed?

A. The Great Northern.

Q. And were you a member of the train crew of the Great Northern on this Knight Templar special near Saco, Montana, on July 13, 1928? A. I was.

Q. What was your position in that train crew?

A. Flagman or rear brakeman.

Q. You have been here during the entire trial, haven't you? A. Yes, sir.

Q. You have heard this testimony from the various witnesses that a brakeman came through the train and used language to the effect generally, that a Sir Knight had fallen from the train, or a Sir Knight fell overboard? A. Yes, sir.

Q. Are you the man that came through the train and made that announcement? A. Yes, sir.

Q. Now, Mr. Brown, going back for a distance of say five miles before the train reached Saco, will you describe, please, the [275—235] characteristics of the track as to whether it is straight or curved? A. There is two curves.

Q. Where is the most westerly of these two curves?

A. I judge it is five miles west of Saco—four and a half miles.

Q. And where is the second—over five miles?

A. Between four and five miles, I would judge; possibly a little over five.

Q. Where is the second curve?

A. Just before you get to the stockyard. The stockyard track is on this tangent.

(Testimony of Lewis B. Brown.)

Q. Now, before you came to that first curve, where were you riding on the train?

A. I think in the smoking-room, before I came to the first curve.

Q. Before you came to the first curve?

A. Yes, sir.

Q. Well, at about that time did you perform any duties in connection with the operation of the train?

A. Between the two curves I walked to the back end of the train and looked out, not outside of the observation-car, but to the back of the car.

Q. I don't understand that; you will have to talk louder.

A. I walked to the back of the car, not out on the platform, but to the back of the car, and looked out, to locate myself.

Q. After you had looked through the back of the car, as you say, what did you do next?

A. I sat down in the back part of the car, that is, in the parlor end of the car.

Q. You refer to the observation-car? [276—236]

A. Yes, to the parlor end of the observation-car.

Q. Then after you—how long did you sit down there in the parlor end of the observation-car?

A. Until they rounded the curve on the tangent by the Saco stockyards.

Q. When they rounded the curve there at the stockyards where did you go?

A. Into the rear end of the first sleeper ahead of the observation-car.

Q. What did you have in your hand, if anything?

(Testimony of Lewis B. Brown.)

A. My lantern, a white lantern.

Q. A white lantern? A. Yes, sir.

Q. When you got to that rear vestibule of the first car ahead of the observation-car, what did you do?

A. Opened the vestibule door on the north side of the car.

Q. Now, before we go any further Mr. Brown, I want you to—I have some photographs here. I have here a series of photographs which are marked C, D, E, F, G, H, I and J, which are photographs of the vestibule of a Pullman car. Will you look at these photographs and tell us whether these photographs correctly show the kind of vestibule on the car which was next ahead of the observation-car, the one where you say you were when you opened the vestibule door?

A. Yes, sir, those are the identical ones.

Q. Is that the same car as the car which was the one ahead of the observation-car on this train?

A. Built identically the same.

Q. Not the same car, but built identically the same, you say? [277—237]

A. Built identically the same.

Mr. DIBBLE.—I offer these photographs in evidence.

(Photographs marked Defendant's Exhibits "C," "D," "E," "F," "G," "H," "I" and "J.")

Mr. DIBBLE.—You know it is the same kind?

Mr. ROCKWOOD.—Yes, we went and found one.

Mr. DIBBLE.—We have no objection.

(Testimony of Lewis B. Brown.)

Q. You say you opened the vestibule door?

A. Yes, sir.

Q. I show you Defendant's Exhibit "G." Tell us what that shows as to the condition of the car, compared with what it was after you had made your first move there in the vestibule?

A. This is as the car would appear after I had opened the door, and also at the time the accident happened.

COURT.—Speak louder, please.

A. This is identical with the position of the door when the accident happened.

Q. Now, in that picture there is a trap, or a continuation of the floor over the door? A. Yes, sir.

Q. How does the door in that car open? That is, does it swing—are the hinges toward the front end of the car, or towards the rear end of the car?

A. Towards the end of the car, that is, the enclosed end; towards the body of the car; from the vestibule to the body of the car.

Q. Does this exhibit "I," properly show how the door swings? Is that correct? A. Yes, sir.

Q. When the door is open which way does the open trap swing? [278—238]

A. Up against the door of the car.

Q. And does this exhibit "G" correctly show the direction in which the trap swings?

A. Yes, sir.

Q. On that car is the vestibule—which must be opened first, the trap, or the door? A. The door.

Q. Is it possible to open the trap without opening the door?

(Testimony of Lewis B. Brown.)

A. No, sir, impossible; the door sets on—over the edge of the trap.

Q. I show you exhibit "F." Does that show correctly the condition of the vestibule after the door is opened and the trap is up?

A. Yes, sir, after the door is opened and the trap is raised.

COURT.—I doubt whether the jury is getting very much.

Mr. ROCKWOOD.—(Showing pictures to jury.) This shows the vestibule as he says it was when the accident happened, with the trap down and the door open. This next picture simply, we put in to show the way the door operates, and this next picture is put in to show the way the trap operates, swings up against the body of the car. The next picture shows the vestibule completely opened up, with the door open and the trap up.

Q. Now, I show you another picture of that vestibule, Mr. Brown, with the door open and the trap down, but taken from a slightly different angle. Inside is a horizontal lever, right inside. Was the car on which this accident happened equipped with a lever, as shown in that picture?

A. Yes, sir.

Q. That is Exhibit "E." Now I show you Exhibit "C," which is an interior picture of the vestibule with the trap down and the [279—239] door open. Will you tell us how that picture compares with the condition of the car at the time this accident happened?

(Testimony of Lewis B. Brown.)

A. Well, it compares with the exception of the south door was closed.

Q. You mean the door into the—

A. The south door of the vestibule. This was taken with both doors open, you see; otherwise it is identical.

Q. You mean that the photograph is taken with both doors of the vestibule open? A. Yes, sir.

Q. Whereas, at the time of the accident, only the one which you opened, was in fact open?

A. Just the one, was the only one.

Q. Now, I show you another interior view of the vestibule. How does that compare with the condition of the car as it was when this accident happened? A. That compares.

Q. Is it the same, or different?

A. It is the same, yes, sir; this is the same.

Q. This last one that I show you is Exhibit "B." Now I show you Exhibit "I," which is an interior view with the door ajar. How does that compare with the condition at the time the accident happened?

A. The door was back wide open and latched open.

Q. At the time the accident happened?

A. Yes, sir.

Q. So this picture, showing the door ajar, does not correctly represent the condition as it actually was at that time? A. No, sir.

Q. Now, Mr. Brown, showing you Defendant's

(Testimony of Lewis B. Brown.)

Exhibit "E," tell us [280—240] where in that vestibule there were lights, if any, at that time?

A. There were dome lights directly over the trap on each side, in the vestibule.

COURT.—Two lights in the vestibule?

A. Two lights, one over each trap; one on each side, light, yes.

Q. Now, can you show us in that picture—does that picture I have just referred to show the light?

A. This shows light; it is concave. The light is put in concave in the top of the car, and is porcelain, I should judge; some white material, lined, that to reflect the light down.

Q. And that round white spot in this picture is the dome light you refer to? A. Yes, sir.

Q. At the time this accident happened what lights were on in the vestibule?

A. All the dome lights, or all the vestibule lights were burning.

Q. How many vestibule lights were burning in this particular vestibule?

A. Two, one on either side light.

Q. Now, I show you this interior picture, which is Exhibit "I." Showing a different interior, with the door ajar, and up above is a kind of white line, sagging white line. What is that white line?

A. That is the communicating signal to the engine, air signal, the communicating signal.

Q. Where is that cord in the vestibule, with respect to the trap, the trap on which you were standing?

(Testimony of Lewis B. Brown.)

A. It stands on a line about over the inner edge of the trap.

Q. Approximately over your head, too?

A. A little in; just virtually right over the inner edge of the [281—241] trap.

Q. Now, Mr. Brown, you have said that you came up into this vestibule and opened the door?

A. Yes, sir.

Q. And let the trap down? Was there any operating reason why you used that particular door, rather than the door at the front end of the observation-car itself? A. Yes, sir.

Q. Tell us what that operating reason was.

A. The doors and traps are different in the observation-car that we had at that time, and this car. In order to get out on the front end of the observation-car, on the observation platform, that is, on the platform on the observation-car, you would have to open the trap and then the door. On the other one you open the door and then the trap.

Q. Why did that make any difference to you in your train operation?

A. The rules require that when we close a switch we must drop off at the opposite side of the train from the switch, and when I drop off at a switch, in closing the door on the Pullman car I would leave the trap down and the door closed; and on the Great Northern observation-car, if I closed the door I would leave the door closed but the trap open.

Q. And what was your intention when you opened this door, as to getting off the train?

(Testimony of Lewis B. Brown.)

A. When I go off, to pull the door shut, and after closing the switch, to go to the rear end of the observation-car to ride through the side-track.

Q. What was the duty which you had to perform in connection with getting the train onto the side track? [282—242]

A. Close the passing track switch, or line it up for the main line.

Q. What operating duty did you have after the train had left the passing track to go back onto the main line on its trip east?

A. To close the eastward passing track switch, the switch at the east end of the passing track, after the train had cleared it.

Q. And it is that operation which you were intending to do, when you started up into the vestibule? A. Yes, sir.

Q. Now, after you opened this vestibule door, what position did you take?

A. I was standing with my—

Q. Stand up; I think you can illustrate.

A. Standing with my lantern in my left hand, holding the brake lever, in the vestibule, with my other hand resting against the door; leaning out looking forward.

Q. Where was your hand, your right hand, if you remember, with respecct to the height of your shoulder?

A. Up almost level, I would judge.

Q. While you are right there, as nearly as you can, show the position in which you stood when you

(Testimony of Lewis B. Brown.)

were leaning out of the car. (Witness illustrates.) Now, while you were standing in that position, when were you first aware, if you were aware, of anybody being near you?

A. When there was a hand laid on my forearm, or wrist.

Q. That hand was laid on which arm of yours, your left arm or your right arm?

A. The right arm.

Q. How was it laid on you Did it grip you, or was it laid on you, or how? [283—243]

A. Just ordinary pressure, like you would lay your hand on one's arm to attract their attention.

Q. Now, stand up again. When that hand was laid on your arm, when you had your right arm out, what did you do next?

A. I dropped my arm to look around that way, to see who it was.

Q. Just turn slightly towards the right?

A. Turned slightly to the right, or looked back to see who it was.

Q. What was your left hand doing at that time?

A. Still holding the brake lever.

Q. Now, when you looked around what did you see, and then what happened, Mr. Brown?

A. I saw—there was someone walked by me and stepped off—just stepped off the platform.

Q. What did you do to prevent it?

A. I grabbed at him.

Q. Could you get hold of him at all?

A. No, sir.

Q. At that moment was there a lurch of the train?

(Testimony of Lewis B. Brown.)

A. No, sir.

Q. As that person walked by you was that person —did he have his arms extended? A. No, sir.

Q. As an unbalanced person? A. No, sir.

Q. Or did he appear to be balanced?

A. Just as though anyone would walk along.

Q. As he made those steps from the car, what did you observe as to what happened to him? [284—244]

A. Well, I naturally looked to see that he didn't go under the wheels of the car, and saw him light.

Q. Could you see how he lit?

A. Yes; he lit with his face to the west, his back to the way the train was running.

Q. Did he light head first, or feet first?

A. Feet first, and then set back down, and then straightened up lengthwise, full length.

Q. Fell back on his back? A. Yes, sir.

Q. When he did that, Mr. Brown—when that happened, what did you do then?

A. Pulled the signal cord for them to stop.

Q. Then what did you do?

A. Kicked the car door shut, and then went back and notified them that one of the party had fallen off the train, and advised someone not to let the train back up until we located the party that had fallen off, and also someone to advise the conductor of the accident.

Q. Do you know who it was you made those remarks to? A. No, sir.

Q. Then where did you go?

(Testimony of Lewis B. Brown.)

A. Went to the rear of the train; as soon as they were slow enough, dropped off; almost immediately dropped off after getting back there.

Q. Where did you go then?

A. Went back up the track to locate the party that had fallen off.

Q. Did anybody go with you?

A. I got off first and started, but there was one or two of [285—245] the men that passed me, and one of them took my lantern. He says, "I can outrun you, let me have your lantern," and just took it and went on.

Q. Did you go back to where Mr. Shellenbarger was lying? A. Yes, sir.

Q. How did you find Mr. Shellenbarger lying when you got there?

A. He was lying on his back, and one arm was—I forget which arm it was—but one arm or hand was under his back.

Q. Now, which direction was his head?

A. To the east.

Q. To the east? A. Yes, sir.

Q. And how did his body lie there at that particular time, with respect to the rails of the track?

A. Parallel.

Q. Did you examine the ground or check up to see whether there was any evidence that he had slid on the ground after he fell?

A. He had slid a very little, yes.

Q. You say a very little; how far did he slide?

A. Well, I wouldn't judge that he slid more than a foot; just a very little.

(Testimony of Lewis B. Brown.)

Q. Now, did you pick up any objects around there belonging to Mr. Shellenbarger? A. No, sir

Q. Did you see any objects lying on the ground?

Q. I saw his glasses, and his his glass-case and pencil, or pen.

Q. How long did you stay back there?

A. Until they came and got him.

Q. Who came and got him?

A. Well, some of the men. [286—246]

Q. I mean, what kind of a conveyance?

A. An automobile.

Q. After that how did you get back to the train?

A. Walked back.

Q. And did anybody walk with you?

A. There were two or three of the party walked back with me.

Q. Do you know who they were?

A. No, I do not.

Q. What is your estimate, Mr. Brown, as to the distance the train was from Saco station at the moment that Mr. Shellenbarger fell off, that is, where he was found?

A. I would judge a mile.

Q. You didn't measure it, did you?

A. No, no, no. But I would judge we were about halfway down on the straight track between the switch and the tangent, or the curve.

Q. How fast was the train going, do you estimate, at the time that he fell?

A. I would judge from fifteen to eighteen, possibly twenty miles an hour. May have been a little

(Testimony of Lewis B. Brown.)

faster. Pretty hard to judge in the night, when you are standing on a coach.

Q. After you got back to the train did you see Mr. Shellenbarger further that night?

A. Yes, sir, I went up to the baggage-car.

Q. And I suppose there were a good many of the passengers around up there in the car?

A. There were quite a good many in there.

Q. Mr. Brown, how long have you worked for the Great Northern?

A. A little over nineteen years. [287—247]

Q. And has most of that time been spent in the passenger service? A. All but eleven months.

Q. In what capacity?

A. As brakeman, passenger brakeman, yes.

Q. As a passenger brakeman? A. Yes, sir.

Q. What is the operating practice on the Great Northern, as you have observed it, and as you have performed those duties yourself, as to the point where a rear brakeman will get on and off the train to perform his duties, during this period, day or night, when the passengers are up and about in the observation-car?

A. The forward end of the car, or the rear of the next car forward. Between the first and second cars.

Cross-examination.

(Questions by Mr. DIBBLE.)

Mr. Brown, referring to this first exhibit, this Exhibit "C," will you please state whether this door that I am pointing to here now with my pencil,—is that the door that you fastened back?

(Testimony of Lewis B. Brown.)

A. Yes, sir.

Q. And as you look at that picture there, are you looking towards the east? A. Towards the north.

Q. You are looking towards the north?

A. Yes, sir.

Q. And which way would the observation-car be on that picture? A. Be to the back of it.

Q. Would be that way?

A. Yes, sir. [288—248]

Q. The observation-car would be back there?

A. To the left of the picture.

Q. Yes, to the left of the picture. So a person coming from the observation-car, he would come through this opening here? A. Yes, sir.

Q. The observation-car being back there, would step in here? A. Yes, sir.

Q. And that is the door that you say you opened?

A. Yes, sir.

Q. And fastened back. Where are the hinges there? A. They are on the outer side.

Q. Over here?

A. This is the hand-rail; right here is the hand-rail, and that little knob that sticks up is the fastener for the trap when the trap is raised.

Q. So the hinges are over here on the outside edge? A. Yes, sir.

Q. So the door, if you wanted to close it, would swing back towards the observation-car, back that way, wouldn't it? A. Yes, sir.

Q. And if you wanted to—and you wanted to look ahead in the direction the train was going, to look

(Testimony of Lewis B. Brown.)

out to see Saco, or look up that way, you could if you wanted to stand here on the platform, couldn't you? A. Yes, sir.

Q. And pull the door back towards you so as to keep the opening there closed?

A. It could be done, but you run a risk of being knocked out of the door. [289—249]

Q. We will get to that later; but I just wanted to see what a person might do if they wanted to.

A. Yes, sir.

Q. The way that hinge is fixed there on the car, and the way the door swings in, you want to look out along the track towards the engine, you could stand there on the platform of the vestibule, couldn't you? A. Yes, sir.

Q. And, although you have the door open, you could stand there and leave it all closed except the part where your head and shoulders were sticking out looking towards the engine? Couldn't you?

A. Yes, sir, but that would be a foolish practice, a practice in violation of our book of rules.

Q. I will show you I think pretty soon, you broke the rule anyway.

Mr. ROCKWOOD.—You and I will argue that out.

Q. Yes, we will go into those matters later; but I just want to see what might be done to protect a person from injury, from an accident, who might be riding on the train. So if you wanted to, although you say would be contrary to your rules—

A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. You could, the way the door is hinged, open it and pull it over towards yourself as you stood there, and leave no more opening—

COURT.—You mean pull it back of him?

Mr. DIBBLE.—Yes. This door is not hinged that way.

COURT.—I think the jury understands. [290—250]

Mr. DIBBLE.—If I could find a door with hinges; if that right-hand door of those two doors had a knob on it, and the hinge was over on the right-hand side, you could open that door and stick your head and shoulders out, and look over there to the Clerk's office, and have all the door closed except the part where your head and shoulders are sticking out?

A. Yes, sir.

Q. So you could if you wanted to have opened this door—

COURT.—He has told you two or three times he could do that.

Q. And had you done that in this instance it would have prevented Mr. Shellenbarger from walking off the car, as you say he did, wouldn't it?

A. Yes, sir.

Q. Because he could have walked either into you or into this door, wouldn't he? A. Yes, sir.

Q. So, if you had been standing in that way, with the door open, this man couldn't have stepped off the train? A. He couldn't.

(Testimony of Lewis B. Brown.)

Q. And he couldn't have been thrown off the train?

COURT.—Did you close the door behind you and stand on the platform?

A. No, sir.

COURT.—Would leave a space between the edge of the door and the observation-car?

A. Just the same as this door; you can open the door and stand in the door. We will grant that door sits within an [291—251] inch of the edge of the platform. That is all the space that is outside the door, an inch or less on the platform when the door is closed.

Q. Now, referring to Defendant's Exhibit "B," the second one here, Mr. Brown, does this picture show this very same door that you spoke of?

A. Yes, sir.

Q. As it was fastened back? A. Yes, sir.

Q. At the time the accident occurred?

A. Yes, sir.

Q. It is just another picture then identical with this first one?

A. Taken at a little different angle.

Q. Taken at a little different angle. Were you standing on the steps? A. No, sir.

Q. Of the vestibule, or were you standing on the platform itself?

A. I was standing on the trap.

Q. You were standing on what I am pointing to there with my pencil? A. That is the platform.

Q. Where is the trap?

(Testimony of Lewis B. Brown.)

A. Here—no, this is the trap; yes.

Q. That is what I thought. The trap forms the floor, doesn't it, when down?

A. The floor over the steps; yes, the floor over the steps.

Q. When the trap is closed over the steps that makes the vestibule door, as far as that part of it is concerned, [292—252] over the steps.

A. It is a continuation of the floor of the vestibule when it is down.

Q. And there were four steps, weren't there?

A. Four steps, I think.

Q. Below the surface of this trap; and you were standing on the trap itself? A. Yes, sir.

Q. Now, is this trap about the same height as the floor of the back of the observation-car?

A. It is about—how is that?

Q. The same height from the ground?

A. Standard make, same height.

Q. Same height. In other words, if you were standing on the rear platform of this observation-car, and looking around that side of it, you would be standing up just as high? A. Just the same.

Q. Have as good a view as you would have from standing on the trap over these steps at the back of this coach? A. Same height.

Q. Elevation would be the same?

COURT.—Good a view of what?

Mr. DIBBLE.—Up towards the engine, in the direction he is looking.

COURT.—You mean outside of the train?

(Testimony of Lewis B. Brown.)

Mr. DIBBLE.—Looking around the track, your Honor.

A. He means the elevation from the trap to the ground.

Mr. ROCKWOOD.—If he were standing on the rear platform of the observation-car, he would be the same height from the ground as the rear platform or vestibule of the first car forward. [293—253]

Q. That is what I am trying to get at. Because, as I understand it Mr. Brown, you were there for the purpose of watching the operation of the train?

A. Yes, sir.

Q. And this work, whatever you were doing, required you to look ahead towards the engine, did it?

A. Yes, sir.

COURT.—Outside the train?

Mr. DIBBLE.—Yes, look outside.

COURT.—Look along the train?

Q. Yes, look along the train towards the engine; so if you wanted to you could have stood right there on the rear platform of this observation-car and looked around the left-hand end of that observation-car and looked along the train of cars towards the engine, couldn't you?

A. I could have, providing none of the passengers were in my way.

Q. You could have asked them to step out of your way, couldn't you? A. Oh, yes.

Q. Just like you asked them to step out of the way when you went back and jumped off after the

(Testimony of Lewis B. Brown.)

man was hurt? You went back afterwards and opened up the gate?

A. No, I went over the railing.

Q. But you got off the train from the back end, didn't you? A. Yes, sir.

Q. Why didn't you go off there from the rear end of this coach ahead of the observation-car?

A. I wanted to notify the men in there of the accident, and [294—254] also to notify them, or to get some of them to notify the conductor, of the accident, and advise him not to let the train back up until after we had located the party that had fallen off.

Q. This Defendant's Exhibit "E," that shows the steps better, doesn't it?

A. That shows the steps.

Q. This picture, Mr. Brown, shows the vestibule door open, as I understand it, but the trap which covers the steps, shows the trap closed?

A. Yes, sir.

Q. So that, according to your testimony, that was the way the train was, and that would make you be standing up here where I have my pencil, wouldn't it? A. Right on the edge of the trap.

Q. Right on the edge of this trap. You would be standing there that way, and your right hand would have hold of this grab-iron that is along the car, would it? A. No, sir.

Q. What did you have hold of with the right hand?

(Testimony of Lewis B. Brown.)

A. Resting against the door, about the height of my shoulder.

Q. You didn't have hold of this iron rail?

A. No, sir.

Q. It is put there to hang on to, isn't it, that grab-iron there?

A. Put there yes, for getting on and off the car.

Q. And if you were riding along there, a brakeman or anybody else riding along there, he could use that to steady himself by, couldn't he, as he stood there on the platform? [295—255]

A. It is too low.

Q. It is too low there? A. Yes, sir.

Q. That is for getting on and off?

A. On and off.

Q. Then what did you have hold of with your left hand?

A. Hold of the brake lever; it shows in one of these pictures.

Mr. ROCKWOOD.—Let's get this straight. He said with the right hand what did you have hold of?

A. The right hand was just resting against the door.

Q. That is what I mean. Did you have firm hold with your right hand, of anything?

A. No, sir, just resting against the door.

Q. Was there anything on the door you could take hold of with your right hand to steady yourself? A. No, sir.

Q. So your right hand was just resting up against the door like? A. Against the door.

(Testimony of Lewis B. Brown.)

Q. And then your left hand?

A. Was hold of this brake lever; that brake lever is made to lock back when it is in that position, to hold it firm against the end of the car.

Q. That brake lever doesn't seem to be higher than the grab-iron.

A. About the same as the top of it. They are almost the same as the top.

Q. It looks a little bit lower, if anything, to me. This one here is the brake lever; that piece along there, and this iron here is the handhold on the right. What is the fact as to whether this brake lever you speak of is higher or lower than [296—256] the grab-iron?

A. The two grab-irons are exactly the same height at the top. This brake lever is just the height of the top of that grab-iron, or the curvature of the grab-iron.

Q. Are they the same height?

A. Yes, sir; it is the angle the picture is taken in.

Q. You were standing with both your feet on the trap-door? A. Yes, sir.

Q. So you were just standing level?

A. Yes, sir.

Q. So both your arms would be in the same position, as far as height is concerned, from the floor?

A. No, the right arm was elevated.

Q. Wouldn't have to be, would it?

COURT.—It was in fact.

Mr. ROCKWOOD.—It was, though.

Q. You say it was? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. How much was it elevated?

A. I presume eighteen inches or more.

Q. It wasn't elevated enough to allow a man to be thrown under it? A. No, sir.

Q. Between you and— A. Well, yes.

Q. And the body of the car, was it?

A. As far as that goes, a man could be thrown under this arm.

Q. We are talking about the right arm now.

A. Yes, sir.

Q. Your right arm wasn't held up so high on the door a man [297—257] could be thrown under that, between your right arm and the body of the car, was it?

A. Not if he was standing upright, no.

Q. And Defendant's Exhibit "F," shows the vestibule with this door open. Is the trap open or closed there?

A. Open. See this line of the trap up here?

Q. In this picture it is open? A. Yes, sir.

Q. And that is looking right out from a side view of it?

A. Yes, sir, that is the ordinary position in the loading or unloading of passengers.

Q. This exhibit "G," that is the same thing except the trap-door is down?

A. Yes, sir, same thing.

Q. And this exhibit "H," that is the same, I take it, as the last picture, except that this trap-door—is that the trap-door? A. Yes, sir.

Q. On an angle there? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. It shows on this exhibit, that trap-door partially raised up? A. It is unlatched there.

Q. Unlatched, but not fully pulled up. And this Defendant's Exhibit "I," shows this vestibule door, shows more clearly than the rest, the way it is hinged, doesn't it? A. Yes, sir.

Q. And this shows what I was getting at a while ago? A. Yes.

Q. You could have had this door in the same position shown [298—258] in this photograph here, this Defendant's Exhibit "I," and have stood there in this opening between this side of the door and the back of the vestibule, couldn't you?

A. Yes, sir.

Q. And then looked from that point ahead along the train, and towards the engine, to make whatever observation you wished?

A. I could have, but it would have been kind of a dangerous position.

Q. Would have been dangerous to you?

A. Yes, for me.

Q. Would not have been dangerous for the passengers, though?

A. I presume not; not as dangerous, at any rate.

Q. And this Defendant's Exhibit "J," which is the last one, that shows the door again partially open, and an interior view. If you were opening it that way you would stand here, wouldn't you, and look out ahead forward? A. Yes, sir.

JUROR.—Now, as I understand, the train was going east, like that?

A. Yes, sir.

(Testimony of Lewis B. Brown.)

JUROR.—Did the door open around this way, or around this way?

A. Around this way. Like you would catch the door with your right hand and pull it back that way.

JUROR.—And you say you had hold of the brake lever with your right hand?

A. Left hand.

JUROR.—The right hand was against the door?

A. The right hand was against the door.

JUROR.—I *understood had* your right hand against the [299—259] brake lever, and your left hand against the door? A. No, sir.

JUROR.—The door opens into the car?

JUROR.—(Second one.) That is what I thought; I thought you said your left hand against the door, and I wondered how you could do it.

A. No, the right hand.

JUROR.—I understood the right hand on the brake lever and the left hand on the door, and I was wondering how that could be. That is all. I was getting at that.

Q. How long had you been standing out there before you felt someone, as you say, lightly touch you on the arm?

A. Oh, I don't know; I presume not over a minute; it is hard to judge the duration of time.

Q. You had been out there a minute or less, had you? A. Possibly, yes.

Q. It would be at least a minute?

(Testimony of Lewis B. Brown.)

A. I presume about that; about that length of time.

Q. Might have been longer than that?

A. Not much longer.

Q. So that for a minute of time then, while the train was in motion, the left hand vestibule door at the rear coach ahead of the observation car, was open? A. Yes, sir.

Q. And fastened back to the body of the car?

A. Yes, sir.

Q. And that condition existed at least for a minute?

A. Yes, I would judge not longer than that.

Q. And during all that minute the train was in rapid motion, wasn't it? [300—260]

A. It wasn't very rapid motion; I should judge about between fifteen and twenty miles an hour.

Q. Was going right along? A. Oh, yes.

Q. And was there any—did you have any lantern placed on the rear of that platform, a red light, to show a passenger who might be coming into that coach, that the door was open?

COURT.—Ask if he had a lantern there.

A. It is clear out of the practice—

Q. Just answer the question there, if you had one there or not.

COURT.—Did you have one?

A. Nothing but my white light.

Q. That was on your arm?

A. Yes, sir, was holding in the left hand.

(Testimony of Lewis B. Brown.)

Q. Holding in the hand? Then how could you take hold of this thing here, the brake lever?

A. Holding the lantern by the bail, over the hand, like that.

Q. You had the bail of the lantern, and your hand— A. Holding the brake lever.

Q. Holding the brake lever? A. Yes, sir.

Q. Didn't have it on your arm? A. No, sir.

Q. So that the light would be furthest in towards the brake lever, wouldn't it? A. Yes, sir.

Q. Would be over perhaps—

COURT.—That is enough; he has answered it once. You need not ask him about it again. He can't make it any stronger by answering it twice, than he can once. [301—261]

Q. Would be kind of hard, wouldn't it, for a man, if he were coming out of the observation-car, where the door is in the middle there, and undertaking to pass from the observation car to go forward, he would not see this white lantern in your hand there, would he? Wouldn't be likely to see it?

A. I don't know; the vestibules of the cars are almost as light as this room.

Q. I am speaking about the light itself, its own light. It would be tucked around there in a position where a person would not observe that?

A. Well, the light from our lanterns is nothing compared with the electric lights, as they dim them.

Q. I mean in the position which you held it. A person coming into the vestibule to go into the next car, would not be likely to see that light, would he?

(Testimony of Lewis B. Brown.)

A. Not be likely to, no.

Q. And you didn't have that light there for the purpose of being any warning to passengers, did you? A. No, sir.

Q. That was just for your own—

A. That is part of my working equipment.

Q. That is just for your own use? A. Yes, sir.

Q. Now, then, if I understand you, the particular work which you were going to finally do, would be to get off of that train when it went through the switch? A. Yes, sir.

Q. Of the siding? A. Yes, sir.

Q. Then you would close the switch?

A. Yes, sir. [302—262]

Q. And get on to the train? A. Yes, sir.

Q. And you would get on the train at that time at the rear end? A. Yes, sir.

Q. Now, while you were fixing, or closing this switch, the train would remain standing, wouldn't it? A. No, sir.

Q. It would not pull out and leave you?

A. Pull right on down into the clear.

Q. I know would pull in the clear; but I mean after it did clear, after it cleared the switch?

A. It would stop.

Q. It would stop? A. Yes, sir.

Q. And allow you enough time to close the switch?

A. Yes, sir.

Q. And then get on the car? A. Yes, sir.

Q. Else the train would go away and leave you. So if you had wanted to you could have gotten off

(Testimony of Lewis B. Brown.)

this train at this time at the rear of the observation-car, and closed your switch and gotten on at the rear end, couldn't you? A. Yes, sir.

Q. And in doing that you could, if you had wanted to, either opened up the back of the observation car, or have jumped over the rail, as you finally did? A. Yes, sir.

Q. Was this rear end so constructed that you could open up the iron railing there at the left side on the rear? A. Yes, sir. [303—263]

Q. And did it have steps and a trap-door there?

A. Yes, sir.

Q. Leading down to the ground? A. Yes, sir.

Q. The same as the rear of this coach ahead did?

A. No, sir, the same as the forward end of the observation.

Q. I beg your pardon?

A. The same as the forward end of the observation-car.

Q. And it had how many steps there at the rear?

A. The same number of steps as the forward end; I couldn't tell you; four, I think.

Q. And an opening there in the railing so you could open it up? A. Yes, sir.

Q. So you could have, if you wanted to, gone back to the rear of the observation-car, and without opening the door, have looked along the track?

A. Yes, sir.

Q. And if you had wanted to get off you could have opened the door? A. Yes, sir.

Q. And gotten down there? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. Isn't that what the rules said you should do? Counsel has asked about the rule?

Mr. ROCKWOOD.—Just a moment. I object to that as calling for an interpretation of the rule.

Mr. DIBBLE.—I want to ask the same thing you did.

Mr. ROCKWOOD.—I object to asking what the practice was; you can ask what the rule is, I have no objection to that.

Q. I will ask you if the printed regulation isn't that you should occupy at the night-time always the rear end of the train? [304—264]

A. During the night—

Q. At night-time I mean.

A. During the night hours—

Mr. ROCKWOOD.—Just a moment; the rule is the best evidence, and is already in evidence. I have no objection to asking if that is the rule.

A. Yes, sir.

Mr. ROCKWOOD.—As now in the record.

Q. And you were violating this rule then, were you? A. No, sir.

Mr. ROCKWOOD.—I object to that as calling for the opinion of this witness.

COURT.—That is his opinion, whether he did or not. Tell what he did, and where he was.

Q. I understand for a time you did ride there in the rear end, in the rear car or compartment somewhere; before you went up to open the door you were riding in the rear car, the observation-car, were you?

(Testimony of Lewis B. Brown.)

A. Your Honor, can I tell him the way—the build of the observation-car?

COURT.—Yes.

A. For your information, the build of the observation-car of the Great Northern, as you come into it from the front end, is the toilet, then you come to the smoking-room, and then there is a drawing-room and two compartments, and then what we term the parlor end of the car, and that is where I was riding; in the parlor end of the car prior to the accident.

Q. You were clear then to the rear end?

A. Clear to the rear of the car; yes, sir. [305—265]

Q. You were nearer to the rear of the observation-car than you were to the back end of this forward coach? A. Yes, sir.

Q. And after the accident occurred, did you open up the train at the back? A. No, sir.

Q. You went over the railing?

A. Over the railing, yes, sir.

Q. And as you stood there at the back of this coach just ahead of the observation-car you were—up to the time you felt somebody touch your arm, you were leaning out, weren't you? A. Yes, sir.

Q. And you were looking towards the engine?

A. Looking forward, yes.

Q. Along the train? A. Yes.

Q. So you had your back all during that time to the vestibule? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. And you couldn't see if anybody was in there or not? A. No, sir.

Q. And there was nobody else there helping you?

A. No, sir.

Q. No other man there. A. No, sir.

Q. And now then, did you say that while you were standing in that position someone just walked up and very lightly took hold of your arm?

A. They didn't take hold of my arm; they just laid their hand on my arm, like that.

Q. Just like you might do there now?

A. Yes, sir.

Q. Just like I am walking up and laying my hand? [306—266]

A. Just like you might put your hand on my arm to attract my attention.

Q. Which arm was that?

A. It was my right forearm near the wrist.

Q. Somebody just touched your right arm?

A. Just laid their hand on my arm.

Q. As you had that up against the door?

A. Yes, against the door.

Q. That caused you to turn around, didn't it?

A. Yes, sir.

Q. I suppose you swung right around towards your right, didn't you?

A. I just dropped my arm and turned to look to see who it was.

Q. Did you still keep hold with your left hand of the brake lever? A. Yes, sir.

Q. And your lantern? A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. You still kept hold there? A. Yes, sir.

Q. And just turned to your right, like this?

A. Yes, sir.

Q. And then you saw Mr. Shellenbarger, didn't you? A. I saw someone walk right by me.

Q. You saw somebody there. How many steps did he take? A. I would judge about two steps.

Q. So when they started towards you, they must have been several feet away from you?

A. Couldn't have been and lay his hand on my arm.

Q. I mean from the time they started towards you; if they took [307—267] two steps, two ordinary steps?

A. Would take two ordinary steps over to the edge of the platform. The second step may have been off the platform. He just stepped off the platform.

Q. Did you see him take two steps?

A. I don't know; I would judge took about two steps.

Q. You would not say you saw him take two steps?

A. He walked right off the platform; no fall, or nothing; he just walked off.

Q. And he came up and touched you on the hand?

A. Yes, sir.

Q. How fast was the train going at that time?

A. I have answered that question once, if you please.

COURT.—Two or three times; three or four times.

(Testimony of Lewis B. Brown.)

Mr. ROCKWOOD.—Go ahead and answer it again.

A. Any place from fifteen to twenty miles an hour, I should judge.

Q. Was there any opportunity for you to save this man from falling, if that is the way it occurred?

A. I grabbed at him, but I missed him.

Q. If he was just walking, just stepping there, couldn't you stop him from going off that train?

A. I tried it, and couldn't; yes, sir.

Q. Isn't it a fact that he—that this touching of your arm—that that touching was a throwing that struck your arm with great force? A. No, sir.

Q. That that is what you felt?

A. No, sir; was just ordinary—

Q. Was thrown through the air and struck your arm? [308—268]

A. Just as though you would want to attract someone's attention, and just lay your hand on their arm, or their shoulder; you have done that.

Q. That is all there was to it?

A. That is all.

Q. You didn't think at that time, then, anybody was going to fall off the train, did you?

A. No, sir.

Q. Just thought somebody wanted to ask you a question, or something?

A. The natural inference that one would make, that it would be one of the train crew.

Q. When this hand was lying on your arm im-

(Testimony of Lewis B. Brown.)

mediately you didn't think anybody was in danger at all? A. No, sir.

Q. Because had you, you could easily have saved this man, then, couldn't you?

A. I could have held my arm there, sure, and saved him.

Q. Now, then, with the train going twenty miles an hour, when this man stepped off you would not have much view there at night along the ground, would you?

A. The lights from the car windows, from the windows of this car. The car was fully lighted, and makes plenty of light for you to see until possibly ten feet back of the observation-car; possibly more, fifteen feet possibly.

Q. And you say from the time this man stepped off the train going twenty miles an hour, that you actually saw him on the ground there on that right of way? A. Yes, sir.

Q. For how long a period of time did you see him? [309—269]

A. Until the lights of the train had passed; I don't know.

Q. You went by him right away, didn't you? You were shooting right along, twenty miles an hour? A. Yes, sir.

Q. You didn't have very much view of him, did you? A. Full view.

Q. And you saw just how he landed?

A. Yes, sir.

(Testimony of Lewis B. Brown.)

Q. Could you tell with which foot he landed on the ground? A. He landed on both feet.

Q. Both feet at the same time?

Q. Yes, apparently both feet at the same time; and the momentum of the train carried him until he sat down.

Q. Did you see him slide, this one foot you mentioned? Did you see him slide this one foot?

A. No, sir.

Q. Why not.

A. You couldn't with—you couldn't tell back that distance whether any object slides or not when it is by you.

Q. If you saw the man there on the ground for any appreciable time you could certainly see him right there when he slid at the beginning, wouldn't you? You saw him when he struck the ground you say, didn't you? A. Yes, sir.

Q. Wouldn't he slide right away if going to do any sliding?

A. No, he sat right back, and then straightened right out.

Q. Did you say anything to him when he touched you on the arm? A. No, sir.

Q. Did you say "Don't go this way," or "Don't go through here?" [310—270]

A. Didn't say a word, had no opportunity.

Q. If the rear vestibule had been open, there wouldn't have been much opportunity—there wouldn't have been much likelihood of hurting anybody if the train remained standing there?

A. How was that?

(Testimony of Lewis B. Brown.)

Mr. ROCKWOOD.—I don't understand that question.

COURT.—What do you mean by that?

Mr. ROCKWOOD.—Standing where?

Mr. DIBBLE.—If I understand the witness, he is undertaking to give a reason as to why he had to make his observation or use the rear of the coach ahead, and I am trying to develop by him to see if there is any real ground for that; if he couldn't have done everything from the rear of the vestibule without endangering the passengers in any way.

Mr. ROCKWOOD.—He explained what he did. Now, if his judgment was poor, I don't think the witness should be asked about that. Just explain why he did it, or something.

Q. Did you have a view of this man's face as he came forward to you, or touched you? Did you see his face at all before he fell from the train?

A. He walked by me. When I dropped my arm he was walking; just stepped right off; and I had no view, only saw a man.

Q. Did you notice if he had glasses on or not?

A. I couldn't tell.

COURT.—He said he didn't see his face. How could he tell whether he had glasses on or not.

Q. What was Mr. Shellenbarger's condition when you saw him lying there on the right of way when you went back there? A. Unconscious?

Q. Did you notice if his head was bleeding? [311—271] A. How is that?

(Testimony of Lewis B. Brown.)

Q. Did you notice if his head was bleeding?

A. No, I didn't. There was one of the men had him—was supporting his head and shoulders when I got up there; trying to make him as comfortable as possible.

Q. And then how did you get back to the train?

A. Walked back.

Q. And did you walk back with Mr. Cornell?

A. I don't know; I walked back with someone.

Q. Did you walk back with one of the men that had run up there from the rear of the train?

A. Yes, it was one of the passengers that I walked back with.

Q. And do you know whether you were the first one to get off the train, or not? A. Yes, sir.

Q. You were the first one? A. Yes, sir.

Q. And did you see Mr. Stuart? You have been here during the trial; didn't Mr. Stuart get off first—this man; isn't that the first man that got off the train?

A. No, sir, I was the first man off the train; I think—I wouldn't say for sure, but I think Mr. Stuart, the gentleman there, was the man who passed me when I was walking, and took the lantern.

Q. Mr. Cornell, will you stand up? Do you remember seeing that man there? A. Yes, sir.

Q. Did you get off before him, or after him?

A. I was the first man off the train. [312—272]

Q. Now this Mr. Cornell, the second man that

(Testimony of Lewis B. Brown.)

stood up there. I will ask you if he isn't the man that you walked back with? A. I don't know.

Q. Did you walk back with more than one man?

A. I don't know; there was I think two or three men in the party that walked back; I don't know.

Q. And you walked back along the right of way, didn't you?

A. Walked back on and between the two tracks.

Q. And now then, after this accident occurred, you went through the train, and what did you say to these other people on the train?

Mr. ROCKWOOD.—Just a moment, I don't think that is proper.

COURT.—You can ask a definitely impeaching question, that is all.

Mr. DIBBLE.—I am not trying to; I just asked him to say again what he said at that time.

Mr. ROCKWOOD.—I think that is immaterial.

Mr. DIBBLE.—You asked what he said.

Mr. ROCKWOOD.—No, I never asked him what he said; I never asked about any conversation he had.

Mr. DIBBLE.—I thought you asked him if he wasn't the man that made the announcement?

Mr. ROCKWOOD.—Oh, sure; I didn't understand you.

Q. You were asked on direct examination if you were the very brakeman that came through the train after Mr. Shellenbarger fell, and made some statement that a man had fallen. You are that man, are you?

(Testimony of Lewis B. Brown.)

A. I beg your pardon. You mean the train crew?

COURT.—Yes.

A. Yes, sir. [313—273]

Q. What did you say when you came through the train?

A. One of the Sir Knights has fallen off.

Q. Is that the language you used?

A. I don't know whether that is the exact language it was; more than likely it was.

Q. Did you say to anybody at that time, that a Sir Knight had stepped off the train, or walked off the train?

A. Now, I don't know whether I did or not, but it is virtually the same thing.

Q. That is a matter for the jury; we will discuss that later. Now, then, in walking back from the place where Mr. Shellenbarger was on the right of way, were you asked or did you talk with any of the Sir Knights, as to how the accident happened?

A. I may have.

Q. Very likely you did? A. May have.

Q. I will ask you if it is not a fact that as you were walking back from the place where you found Mr. Shellenbarger, to the train, I will ask you if you were not asked by Mr. Cornell, how the accident happened? A. I may have been.

Q. Or how this happened, how this man was injured? And that you replied in substance that the man fell through the vestibule and struck your arm?

A. No.

(Testimony of Lewis B. Brown.)

Q. And you grabbed for him, but couldn't stop him? A. No, sir; no, sir.

Q. I may not have just exactly like you said it, because it is hard to get it; but I am trying to state as near as I can that [314—274] you said in substance to this man, instead of saying he stepped off the train, or walked off the train, you said to this man in substance, that Mr. Shellenbarger had been thrown? A. No, sir.

Q. And fell through the vestibule and struck your arm?

A. No, sir, I never made that statement.

Q. You didn't make any statement of that kind?

A. No, sir.

Q. Or anything like that? A. No, sir.

Q. Or anything to that effect? A. No, sir.

Q. I will ask you if, subsequent to this accident, you didn't make a similar statement to Mr. Stuart?

Mr. ROCKWOOD.—Fix the time, please.

Mr. DIBBLE.—(To Mr. STUART.) What time would that be you had the conversation?

Mr. STUART.—After I got on the train.

Q. After Mr. Stuart got back on the train, and while this witness was on the train.

Mr. STUART.—Yes, we were all on the train.

Q. I will ask you if Mr. Stuart, the gentleman who has just gotten up, didn't inquire how this accident happened, and if you didn't state to him that Mr. Shellenbarger fell through the vestibule

(Testimony of Lewis B. Brown.)

and struck your arm, and broke your hold, and you grabbed for him and couldn't save him?

A. No, sir.

Q. Or words to that effect? A. No, sir.

Q. I will ask you if it is not a fact that you at no time told either of these men that Mr. Shellenbarger walked off [315—275] the train?

Mr. ROCKWOOD.—That is not proper impeachment.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Just so there will be no misunderstanding as to your testimony, when you came up preparatory to looking out of the train, before this accident happened, was the vestibule, which is the rear of the last Pullman car of the train, was that in any way open? A. No, sir.

Q. And was there any opening in it until you opened the door? A. No, sir.

Q. Now, Mr. Brown, let's see just one of these pictures. I show you this Exhibit "J," which is a picture with the door ajar. If the door were in that position, and you had your body inside of the vestibule, and your head out through that opening, would you be able to observe the forward end of the train, and see the locomotive?

A. I don't think so; no, sir.

JUROR.—What was that question?

Mr. ROCKWOOD.—If his body was inside, and his head sticking out there, would he have been able to see up alongside of the train?

(Testimony of Lewis B. Brown.)

A. I don't think so.

COURT.—You mean, walk out on the platform.

Mr. ROCKWOOD.—No. His body inside, and his head outside. His feet and body on the inside, on the platform, and his head through the opening?

JUROR.—The platform, or the trap? I would like to know. [316—276]

Mr. ROCKWOOD.—I say, inside the vestibule. I will put it, as that picture shows.

COURT.—Standing in the vestibule, not on the trap.

Mr. ROCKWOOD.—If he were standing with his body inside the vestibule, with his head stuck out through this opening which I am pointing to in this exhibit, would he be able to see up alongside the train to the engine?

JUROR.—Are you assuming that he would stand on the trap?

Mr. ROCKWOOD.—As that picture shows, that would be just about it, inside the edge of the trap.

JUROR.—I want to ask the question, was the door in that position, or was it clear open?

Mr. ROCKWOOD.—The door was clear open, as he has testified very directly.

JUROR.—If he was standing on the trap, could he see ahead then?

Mr. ROCKWOOD.—I was going to ask that.

Q. To see ahead with the door in approximately that position, you would have to have your body on the outside of the door, standing on the trap?

(Testimony of Lewis B. Brown.)

A. Yes, and holding the front grab-iron, and it would be a dangerous position.

JUROR.—How far from the switch, west of the switch, was it when you opened the door?

A. Right at a mile.

JUROR.—Where?

A. Right at one mile west.

JUROR.—Why did you open at that distance from the switch? What is your custom? Your opening of the door, as I understand it, is to get off when the train has got into the [317—277] siding, close the switch, and then walk around the back end and signal to the engineer to go ahead. Isn't it?

A. There is no specified distance where we shall open the doors, but we have a rule that compels us to get off on the opposite side of the track from the switch.

JUROR.—I was wondering why you opened it so far away from the switch, when there was no necessity of opening it until you got to the switch?

A. Well, we had a slow order, and it was to observe the movement of the train, and the general conditions.

JUROR.—You say it was about a mile back from the switch?

A. About a mile; yes.

JUROR.—They had not stopped for the switch, of course.

A. Oh, no, no.

COURT.—What was your first duty, now, when

(Testimony of Lewis B. Brown.)

this train approached the switch? What was the first duty you had to do?

A. My first duty is to get off and close the switch.

COURT.—Then you do that after the train stops?

A. No, no, drop off the train as it passes the switch.

COURT.—After it runs in on the switch?

A. No, as it passes on. When the train is coming in, like the switch is here, and the train passes the switch, I drop off on the opposite side of the track from the switch.

COURT.—This train was going on the siding?

A. Yes, sir.

COURT.—You mean, after the train turns in on the siding?

A. Yes, sir. [318—278]

COURT.—Then you drop off?

A. Yes, wherever I am located on the train, I drop off.

COURT.—Then there was no necessity of your dropping off the train until it passed in on the siding?

A. Until I came to the switch; but it was my duty to see where I could—be at my position of duty so I could drop off when the time came.

COURT.—The train stops before it enters the switch?

A. Yes, sir.

COURT.—After the front brakeman has opened the switch?

(Testimony of Lewis B. Brown.)

A. Yes, sir.

JUROR.—No occasion for you to get off the train until it gets into the siding and you get off at the switch and close the switch on the opposite side from the engineer?

A. Not necessarily opposite from the engineer; but I get off by the switch as the train pulls by, on the opposite side of the track from the switch.

JUROR.—But you don't get off until the rear coach, which you are supposed to have been in—you don't get off until that has either reached the switch or passed through it?

A. Until it reaches it; yes, sir.

JUROR.—As I understand, you opened this door a mile or more prior to that; and I can't understand why you did that, as long as it wasn't necessary, and the train moving at that rate of speed.

A. We don't consider twenty miles an hour very fast speed, if we were going twenty, and the train was slowing down, and I was in position in case we stopped there. You never know on a slow order when you are going to stop, and I was in position, [319—279] if necessity required it, to drop off.

JUROR.—Could you drop off without opening the trap?

A. Yes, sir.

JUROR.—How many feet *if* the trap above ground?

A. There is a grab-iron on each side, and we can get hold of this and get to the bottom step and stand on that, and pull the door shut on this style of Pull-

(Testimony of Lewis B. Brown.)

man car, when we get off. That leaves your door in normal position.

JUROR.—I want to ask another question. I have watched switchmen with more or less frequency, where they are taking siding, and they don't get off until—the rear brakeman doesn't get off until they get onto the siding, then he throws the switch and goes around and signals to the engineer.

A. Yes, sir.

JUROR.—If you get off any distance back of the switch you would have to walk to the switch before you could close it?

A. Yes, sir.

JUROR.—Ordinarily then, to save walking and delay of walking, you get off at the switch?

A. At the switch, on the opposite side of the track from the switch.

JUROR.—But that was the practice, to get off at the switch?

A. Yes, sir.

JUROR.—That is the time you open the door. You didn't open the trap?

A. No, sir.

JUROR.—You opened the door about a mile back?

A. Yes, sir.

JUROR.—Of where it was necessary to have it open so [320—280] you could get out of the car and perform your duties?

A. Opening that trap put me in position to per-

(Testimony of Lewis B. Brown.)

form my duty in case the train stopped before we got to the switch. My duties require me to go back and protect the rear of the train; as soon as it is stopped, proceed back with the proper equipment to stop any following train.

COURT.—Did you know this train was going to take the siding?

A. Yes, sir.

JUROR.—Wouldn't it, as a matter of fact, been soon enough to open that door when the train stopped, when the front end of the train got to the switch and stopped to open the switch, wouldn't that be soon enough to open the door?

A. Well, close to the switch, yes, sir.

JUROR.—Because you had the full length of the train to go in before you needed to get off.

A. Yes; but we are supposed to be at our position of duty, where we can perform our duty at any time; between the stations, or any place.

JUROR.—You could have been just inside the door, and when the train stopped you would know stopped to open the switch, and then open the door, and as the train was coming back and coming to that switch, you would have had plenty of time to open the door and get off?

A. Yes, sir.

JUROR.—Your duty is to close the switch?

A. Yes, sir, that is one of them.

JUROR.—Now, could you perform it any better by getting the door open a mile back, than you could to open the door [321—281] at the time your

(Testimony of Lewis B. Brown.)

train got on the siding? Or, to put it another way, as Mr. Ross asked you, when the engine comes to the switch and the front brakeman, the head brakeman, opens the switch, if you got off then would you leave the door open and then walk the entire length of the train in order to perform that duty of closing the switch after the train got on the siding; or really, was there any necessity, then, of your opening the door until the train did get on the siding?

A. Well, as it turned out, no. But when the train slowed down I wasn't figuring on the switch then, because I knew we wasn't to it by a mile; but I was figuring on protecting the train as flagman.

JUROR.—Against what?

A. Anything. We never know when there is a train following. We never know when there is a train following us, or how close they are.

JUROR.—You say you have a block system there?

A. Yes, sir.

JUROR.—Wouldn't the block indicate if there were a train? When you are in the block, under your rules, wouldn't that flag that train automatically in the rear?

A. No, sir.

JUROR.—It does not?

A. The flagman must protect his train regardless.

JUROR.—I know that; but the engineer of the

(Testimony of Lewis B. Brown.)

oncoming train—the block would indicate danger ahead, would show a red light, wouldn't it?

A. If it was working, yes.

JUROR.—If your train was in that particular block?

A. Yes, sir. [322—282]

JUROR.—And the oncoming train, coming up to that block, then his orders would be to slow down?

A. Yes, sir.

JUROR.—So you could flag ahead?

A. Yes, sir; but our orders are not to depend on the blocks, because we never know whether they are working or not.

JUROR.—In this particular case, when you were coming onto the siding for a train coming from the opposite direction, there wouldn't have been any possibility of a train coming from the rear, would there?

A. I don't know.

JUROR.—How could it, if a train was coming from the opposite direction, and going to meet you there. Couldn't be one coming the opposite way.

A. Might have been half a dozen following. We were running as a passenger extra, and we had a positive meet at Saco; and might have been a dozen other trains had the same meet.

Recross-examination.

(Questions by Mr. DIBBLE.)

Which side did you say it was that Mr. Shellenbarger fell past you, the right side of you? Was

(Testimony of Lewis B. Brown.)

it? Stepped past you on the right side, or the left side?

A. Passed me on the right side.

Q. Passed you on the right side? A. Yes, sir.

Redirect Examination.

(Questions by Mr. ROCKWOOD.)

Now, Mr. Brown, if the train had stopped there at the switch, and had stopped for any appreciable time, [323—283] would you have dropped off that train to protect the rear end?

A. Yes, sir.

Q. So there was a possibility of your having to get off the train before the car reached the switch—before the rear car reached the switch, was there not? A. Yes, at any time.

Q. In railroad practice, does the Great Northern ever depend on someone else to keep the train safe so the flagman does not go out back?

A. No, sir, it is up to the flagman.

Q. Those are positive directions when the train is standing, is that true? A. Yes, sir.

JUROR.—Do you do any flagging at the rear end without a signal from the conductor or engineer?

A. Yes, sir.

JUROR.—You do?

A. Yes, sir.

JUROR.—Well, I don't know what the practice is on the Great Northern, but usually a flagman—

COURT.—Is that all with this witness?

JUROR.—There has been a lot of talk about

(Testimony of Lewis B. Brown.)

opening the door a mile ahead. Don't you open the door, not for the purpose of getting down and throwing the switch, but in case of an emergency through this section of the track that had this slow order?

A. Yes, sir.

JUROR.—That was the reason you opened it a mile ahead of time?

A. Yes, sir.

Witness excused.

Defense rests. [324—284]

TESTIMONY OF WALTER L. CORNELL, FOR PLAINTIFF (RECALLED IN REBUTTAL).

WALTER L. CORNELL, recalled in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Cornell, you have already been sworn. I will ask you to state to the jury whether or not, after the accident occurred, and while you were walking back from the place where Mr. Shellenbarger was picked up, you had a conversation with the forward brakeman of the train, with regard to how the accident occurred? Just state whether or not you had any conversation with him?

A. I did.

Q. And state whether or not you inquired of him what had happened, or how the accident occurred?

(Testimony of Walter L. Cornell.)

A. I asked him that.

Q. I will ask you if he didn't state to you at that time that Mr. Shellenbarger fell through the vestibule and struck his arm, and that he reached for him to grab him, but couldn't catch him. Or words to that effect? A. He did.

Q. Do you remember just exactly what he did say in that respect?

A. I think I can quote his very words.

Q. Just do it, if you will, please.

A. I asked him how the accident occurred, and he said that he had the door open, and that a man fell against his arm, "And I grabbed for him, but I couldn't save him." [325—285]

Q. State whether or not he told you at that time that the plaintiff walked past him, or stepped from the car?

Mr. ROCKWOOD.—That is improper impeachment.

Mr. DIBBLE.—That is all, Mr. Cornell.

No cross-examination.

Witness excused. [326—286]

TESTIMONY OF D. B. STUART, FOR PLAINTIFF (RECALLED IN REBUTTAL).

D. B. STUART, recalled in rebuttal by the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Stuart, I will ask you to state whether or not

(Testimony of D. B. Stuart.)

you had any conversation after the accident, and after you had gotten back to the train with the rear brakeman in regard to how the accident happened?

A. I did.

Q. State whether or not you inquired of him how it did occur? A. I did.

Q. I will ask you if he didn't at that time state to you, there on the train that Mr. Shellenbarger fell through the vestibule of the car, struck his arm, and that he grabbed for Mr. Shellenbarger, and couldn't save him; or words to that effect? A. He did.

Q. Can you repeat exactly any nearer what he did say?

Mr. ROCKWOOD.—Just a moment.

Mr. DIBBLE.—I withdraw that.

No cross-examination.

Witness excused. [327—287]

TESTIMONY OF W. G. SHELLENBARGER, FOR PLAINTIFF (RECALLED IN REBUTTAL).

W. G. SHELLENBARGER, plaintiff, recalled in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. DIBBLE.)

Mr. Shellenbarger, you have heard the testimony of the rear brakeman with respect to how he says the accident occurred? A. Yes, I did.

Q. I will ask you to state what the fact is as to whether you walked or stepped from the train?

(Testimony of W. G. Shellenbarger.)

Mr. ROCKWOOD.—I object to that as improper rebuttal.

COURT.—You covered that on direct examination.

Mr. DIBBLE.—Was it covered, the other time?

COURT.—I think you did.

Mr. DIBBLE.—I remember he said, of course, that he was thrown, but if it is understood we deny what the brakeman says.

Mr. ROCKWOOD.—I don't think you understand. I tried to avoid that on direct examination, because it is an affirmative matter.

COURT.—Very well.

Q. In the affirmative answer. In their answer in this case it is alleged that you walked or stepped from the train. State whether or not that is true.

A. It is not true.

Witness excused.

Plaintiff rests. [328—288]

Mr. ROCKWOOD.—The defendant at this time moves the Court for a directed verdict in its favor on the ground that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition the vestibule as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. And further that the evidence

shows that plaintiff was guilty of contributory negligence and that such negligence was the proximate cause of the accident.

Objection overruled; exception saved.

Whereupon proceedings herein were adjourned until Monday, December 15, 1930, *a* P. M. [329—289]

Portland, Oregon, Monday, December 15, 1930.

[Title of Cause.]

INSTRUCTIONS OF COURT TO JURY.

R. S. BEAN:

Gentlemen of the Jury, you have hear the evidence in this case and the testimony from the lips of the witnesses and the argument of counsel, and you are therefore in possession of the facts as disclosed by the witnesses, the interpretation and application of the facts as made by counsel, and it now becomes the duty of the Court to advise you, or state to you the rules of law by which you are to be governed in arriving at your verdict. In the trial of a case of this kind the Court and jury have separate functions to perform. It is the duty of the Court, and the exclusive duty of the Court to pass upon all questions of law. The Court has no more right to invade your province than you have to invade its, and therefore it is incumbent upon you to take the law of the case as it is stated to you by the Court, and to apply to that law the facts as you understand them, as developed by the testimony in this case.

Now, in an action of this character, it is incumbent upon the plaintiff, or the person bringing the

action, to state in his complaint, or the first paper filed, the facts upon which he seeks to recover. In other words, he is required to state in his complaint the facts which he alleges [330—290] to have been negligent on the part of the defendant company, and which he claims was the cause of his injury. The purpose of this rule is twofold, first to inform the defendant of what is charged against him, so that he may come into court prepared to meet the charges, and second, to advise the court and jury of the issues they will be called upon to determine.

Now, in conformity to this *to this* rule, the plaintiff in this case, Mr. Shellenbarger, has stated in his complaint that the defendant company was negligent in two particulars. First, it is said that the train upon which he was riding at the time of his injury was negligently and carelessly operated at a high and excessive rate of speed, and so carelessly and negligently operated that it was thereby caused to sway and give an unusual and extraordinary and unnecessary and unduly violent lurch, thereby causing him to be thrown from the train. That is the first charge of negligence in the complaint. The second is that the train was negligently and carelessly operated because an employee of the defendant suffered and permitted the train to be in an unsafe condition, and dangerous to passengers in that the vestibule door was open, and that by reason thereof plaintiff was thrown from the train and injured.

Now the defendant company admits that the plaintiff was a passenger on a train being operated

by and under its control. It deines that the train was carelessly and recklessly operated or that its operation caused the injury to the plaintiff. It admits that the vestibule door was open, but it alleges that it was opened by an employee in the regular operation of the train, and that the plainiff, through his own negligence and carelessness, walked [331—291] through the opening and received the injuries complained of. In other words, it is charged in the answer that the fall and injury of the plaintiff was caused solely by his contributory negligence in that just prior to the time of the injury an employee of the defendant, in the regular discharge of his duties in connection with the operation of the train and in the exercise of due care for the safety of the train and passengers, had opened a vestibule door on one side of the train, and that the employee was standing at said open door for the purpose of observing the movement of the train and assisting in the operation thereof, and that while he was so standing in the opening, and without any warning to him, and without any knowledge on the part of the employee of the intention of the plaintiff, the plaintiff proceeded from the vestibule and fell to the ground and sustained certain injuries. In other words, the defendant alleges that this injury that the plaintiff received was due to his own carelessness and negligence, or, in other words, was due to want of due care on his part. And in orderly consideration of this case, it seems to me that this is probably the first question for this jury to determine, because if this injury was due to the carelessness and negligence of Mr. Shellenbarger, then he is not entitled

to recover, regardless of whether the railway company was negligent or not, and so in an orderly consideration, I would suggest that you consider that question first.

The burden of proof is on the railway company to show that the plaintiff was negligent and that this accident or injury was due to his own negligence. Now, he had a perfect [332—292] right under the law to pass from one car to another, and he had a right to assume, in doing so that the conditions were such that he could *d*afely make that journey, but in doing that he was required, as any passenger on a railway train is, to exercise due care for his own safety, and to look where he was going, and observe the conditions as he found them, and if he negligently and carelessly fails to do so, and is injured he has no good reason to complain against the railway company.

Now, if you think from the preponderance of the evidence that this accident or injury to Mr. Shellenbarger was due to his own carelessness or negligence in walking out through the open vestibule door, then this case is at an end, and your verdict should be for the defendant. But if you do not so find, or do not so believe, then it will be necessary for you to proceed and consider the other questions in the case.

Now, it is admitted that the plaintiff was a passenger on a railway train operated by and under the control of the defendant. The law therefore imposes upon the railway company a certain duty. It was not an absolute insurer of the safety of the passengers. It did not guarantee absolutely that he

would not be injured, but the law did require it to exercise the highest degree of care for his safety as foresight and prudence may suggest consistent with the practical operation of the train, taking into consideration the circumstances existing at the time and prior to the accident, and if it violated the rule in either one or more of the particulars alleged in the complaint, and the plaintiff himself was not guilty of contributory negligence, then the plaintiff would be entitled to recover. [333—293]

Now there are, as I said, two grounds of negligence charged in the complaint. It is not incumbent upon the plaintiff to prove both of them; either may be sufficient if he proves it by a preponderance of the evidence. The burden of proof is on the plaintiff to sustain either one or both of these allegations of negligence. And by burden of proof, I simply mean that he must make out the best case upon thise questions.

Now, first, regarding the alleged reckless and careless operation of the train. It was the duty of the defendant to operate the train with reasonable care, and not to operate it recklessly or cause extraordinary and violent lurches, thereby endangering the safety of its passengers, and therefore if you believe from a preponderance of the evidence that the defendant negligently operated the train in causing it to give extraordinary lurches, it was negligence, and if such negligence was the proximate cause of plaintiff's injury, if, as he says, he was thrown from the train, then the plaintiff would be entitled to recover unless the defendant has satisfied you, by a preponderance of the evidence, that the

plaintiff himself was guilty of contributory negligence.

Now, of course the movement of passenger trains in the manner required by modern demands is such that some swaying and jarring and lurching of the train is unavoidable, and the railroad company is not responsible for an injury to passengers that may result from such usual swaying and lurching, but it is responsible for injury to a passenger from unnecessary and violent operation of the train. [334—294]

The second charge in this case is that the vestibule door was negligently and carelessly opened by an employee of the defendant company, and when I say by the defendant company I mean by someone of the persons in charge of the train. It is admitted that this train on which the plaintiff was riding is what is known as a vestibule train. The object of such vestibule with which the train was equipped is for the comfort, safety and convenience of the passengers, so he may pass comfortably, safely and conveniently from one car to another. The vestibule door, therefore, should not be open, but should be kept closed while the train is in motion, unless it is impossible to do so in the practical operation of the train, and it is a question *if* fact in this case whether or not the opening of this vestibule door by the brakeman was necessary in the practical operation of the train. If it was, then it was not negligence to open it; if it was not, then it was, and if the opening of the door was the proximate cause of the injury to plaintiff, then he would be entitled to recover.

There has been something said about the rules of the company covering the duty of the rear brakeman. These rules were made and promulgated by the company for the government of the conduct of its employees, but a violation of the rules would not entitle the plaintiff to recover in this case unless such violation was the proximate cause of his injury. Whether it was or not is a question of fact for you to determine from the evidence. The question is, was it negligence and carelessness on the part of the brakeman to open the vestibule door at the time he did, and at the place he did, and if so, was that the proximate cause of the plaintiff's injury? [335—295]

That, I think, covers all the questions of law that are involved in this case except one regarding the measure of damages. If you conclude that the plaintiff is entitled to recover, then it will be necessary for you to determine in your verdict and state by your verdict the amount of money he is entitled to. There is no hard-and-fast rule the court can give you by which you are to determine that question. If the matter involved in this case was property which had a market value we could arrive at some reasonable estimate of the recovery, but when it comes to fixing compensation for injury to a human being there is no fixed rule of law. The object to be attained is, of course, just and fair compensation, but the amount thereof must, after all, be left to the good judgment and sound discretion of the jury. In determining that question you should take into consideration the nature and character

of the plaintiff's injury, whether it is temporary or permanent, the loss of time, the loss of services, loss of earnings, if any on account of the injury, and from all that determine what you think is a just and fair compensation that the defendant company should pay him for this injury in case you find that he is entitled to recover.

Now in addition to the general damages, which are said in this case to be fifty thousand dollars, and of course your verdict under no circumstances could exceed that amount, but in addition the plaintiff has asked for special damages, that is he has alleged that he was put to expense of seven hundred dollars for hospital fees, and for nurses; if he is entitled to recover at all, he is entitled to recover whatever may be reasonable on that subject not [336—296] exceeding seven hundred dollars; he is also asking seven hundred and fifty dollars as special damages for medical attendance, and you heard the testimony on that subject, and it is for you to say the amount he is entitled to, if you think he is entitled to recover at all. He is also asking for thirty dollars for examination and treatment of his eyes which he claims was due to and caused by this accident. These are the three items of special damages which he would be entitled to recover in addition to the general damages, in case you think he is entitled to recover at all.

Now, Gentlemen, the questions in this case are largely questions of fact, and they are for your determination. You are the exclusive judges of all questions of fact. You are the exclusive judges

of the credibility of the witnesses. Every witness is assumed by law to speak the truth. This, however, may be overcome by the manner in which the witness testifies, by his or her appearance on the witness-stand, or by contradictory testimony, or by evidence showing that they made statements out of court inconsistent with their present testimony.

Now, there was some evidence in this case tending to show that the brakeman is alleged to have made some statements to some of the passengers on the train that it is claimed were inconsistent with the testimony he gave on the witness-stand. That testimony was admitted simply for the purpose of enabling you to more accurately determine the weight to be given to his testimony here on the witness-stand, and it was not admitted for the purpose of showing that the statements he made out of court, if he made them, were in fact the truth [337—297] but simply for the purpose of showing that he contradicted himself. There is also some evidence tending to show, or it is claimed it tends to show that the plaintiff made at this time statements concerning this accident inconsistent with the testimony he gave on the witness-stand, and that is only for the purpose of enabling you to more accurately determine the weight to be given to the testimony given here under oath.

I think that covers all the questions that are involved in this case, as I understand it.

Two verdicts have been prepared and submitted by counsel, one is for the plaintiff, leaving the amount of his recovery blank to be filled in by you,

and the other is a verdict in favor of the defendant, simply a finding to the effect that the jury think that the plaintiff is not entitled to recover anything.

Jury retires.

Mr. ROCKWOOD.—May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1, 2, 3, 4 and 4–a?

COURT.—That is the motion for a directed verdict?

Mr. ROCKWOOD.—Specific request to take away certain issues from the jury.

COURT.—You can have your exception, but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that instruction must be taken before the jury retires. [338—298]

Mr. ROCKWOOD.—That is what I had reference to when I spoke to you before; I did not care to interupt the Court.

COURT.—You have the same thing in your motion for a directed verdict, so the matter is probably taken care of. [339—299]

[Title of Court and Cause.]

I, Mary E. Bell, hereby certify that I acted as official stenographer in the trial of the above-named case on Thursday, December 11, 1930, et seq., and took down in shorthand all the proceedings at said trial; and that the foregoing pages, numbered from

2 to *199,* inclusive, contain a full, true and correct transcript thereof.

[Seal] MARY E. BELL,
Notary Public for Oregon.

My commission expires April 11, 1933.

Portland, Oregon, December 30, 1930. [340]

[Title of Court and Cause.]

ORDER ALLOWING BILL OF EXCEPTIONS AS AMENDED.

The defendant on March 13, 1931, and within the time allowed by the rules and orders of this court, delivered to the Clerk its bill of exceptions and served a copy thereof on the attorneys for the plaintiff, and thereafter on March 17, 1931, within the time allowed by the rules of this court, the plaintiff delivered and served its objections and amendments to defendant's proposed bill of exceptions, and the court having found that the defendant's bill of exceptions, as modified by plaintiff's amendments thereof, is a true and correct statement of the facts therein referred to,—

NOW, THEREFORE, IT IS HEREBY ORDERED that the bill of exceptions presented by the defendant, above referred to, as amended by plaintiff's objections and amendments hereinabove referred to, shall be allowed as the bill of exceptions in this case and shall be filed with the records of this case in the office of the Clerk of this court.

Dated April 3, 1931.

JOHN H. McNARY,
Judge.

Approved.

A. M. DIBBLE,
Of Attorneys for Plaintiff.
FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

Filed April 3, 1931. [341]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [343]

[Title of Court and Cause.]

PETITION FOR APPEAL AND SUPERSEDEAS.

To the Honorable JOHN H. McNARY, District Judge, and One of the Judges of the Above-named Court:

Great Northern Railway Company, the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment entered herein on the 16th day of December, 1930, in favor of plaintiff and against defendant in the sum of $18,480.00, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from said judgment and the whole thereof for the reasons set forth in the assignment of errors which is served and

filed herewith; and said defendant prays that this petition for said appeal may be allowed and that a transcript of the record and of all proceedings upon which said judgment is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and defendant further prays that an order be made fixing the amount of security which the defendant shall give and furnish upon the allowance of said appeal, and that upon the giving of such security all further proceedings in [344] this court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

Filed April 14, 1931. [345]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [346]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes defendant and files the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above-entitled cause

from the judgment entered herein in favor of plaintiff and against the defendant on the 16th day of December, 1930:

1. The United States District Court in and for the District of Oregon erred in denying the motion of the defendant for a new trial in an arrest of judgment made upon the grounds, among others, that (a) the damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice; (b) the evidence at the trial was insufficient to justify the verdict.

2. That the United States District Court in and for the District of Oregon erred in denying the defendant's motion for a directed verdict in its favor made upon the grounds that there was no evidence to support the allegation in the complaint of excessive speed; that there was no [347] evidence to support the allegation contained in the complaint of any excessive or unusual lurch of the train; that the evidence failed to show that the defendant was negligent in any particular alleged with respect to the condition of the vestibule of the car as to lights, opening, or the method of safeguarding the vestibule; that there was no evidence from which it could be determined that any alleged act of the defendant was the proximate cause of the plaintiff's injury, or of the accident and his resulting injury, and that the evidence showed that the plaintiff was guilty of contributory negligence and that such negligence was a proximate cause of the accident.

3. That the United States District Court in and for the District of Oregon erred in refusing to give

to the jury certain instructions requested by the defendant numbered respectively II, III, IV and IV–a reading as follows:

"II.

There is no evidence from which you may find that the speed of the train was excessive and negligent.

"III.

I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the train is withdrawn from your consideration.

"IV.

I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration.

"IV–a.

I instruct you that there is no evidence in this [348] record from which you can find that the trap-door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered."

4. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness Mrs. Georgia H. Cheney reading as follows:

> "Q. And what was the situation there with respect to the vestibule and steps?"

5. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness Mrs. J. L. Freck, reading as follows:

> "Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?"

6. That the United States District Court in and for the District of Oregon erred in overruling the objection of the defendant to a question propounded to witness J. O. Freck reading as follows:

> "Q. What was the condition of the vestibule there at the rear end of the coach?"

WHEREFORE, defendant prays that said judgment heretofore and on the 16th day of December, 1930, entered in this action against defendant and in favor of plaintiff be reversed and that judgment

be entered in this action in favor of defendant and against plaintiff.

CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,
Attorneys for Defendant.

Filed April 14, 1931. [349]

AND AFTERWARDS, to wit, on Tuesday, the 14th day of April, 1931, the same being the 34th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [350]

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 14, 1931—ORDER ALLOWING APPEAL.

The above-named defendant, Great Northern Railway Company, having duly served and filed herein its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein in favor of plaintiff and against defendant on December 16, 1930, and having duly served and filed its assignment of errors upon which it will rely upon said appeal,—

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court

of Appeals for the Ninth Circuit from said judgment entered in this action in favor of plaintiff and against defendant on December 16, 1930.

IT IS FURTHER ORDERED that the bond on appeal herein be fixed at the sum of $21,000.00, the same to act as a supersedeas bond and as a bond for costs and damages on appeal.

Dated April 14th, 1931.

JOHN H. McNARY,
District Judge.

Filed April 14, 1931. [351]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court, an undertaking on appeal, in words and figures as follows, to wit: [352]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Great Northern Railway Company, a corporation, as principal, and National Surety Company, a corporation organized and existing under the laws of the State of New York having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety therein," as surety, are held and firmly bound unto W. G. Shellenbarger, in the

full and just sum of Twenty-one Thousand Dollars ($21,000.00) to be paid to said W. G. Shellenbarger, his executors, administrators or assigns, to which payment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents. Upon condition, nevertheless, that

WHEREAS, the above-named Great Northern Railway Company has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment in favor of the above-named plaintiff, W. G. Shellenbarger, made and [353] entered on the 16th day of December, 1930, in the above-entitled action by the District Court of the United States for the District of Oregon, praying that said judgment may be reversed,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named appellant shall prosecute its appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its appeal good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the said principal and the surety have executed this bond this —— day of April, 1931.

GREAT NORTHERN RAILWAY COMPANY.

By CHARLES A. HART,
FLETCHER ROCKWOOD,
CAREY, HART, SPENCER & McCULLOCH,

Its Attorneys.

NATIONAL SURETY COMPANY,
(Seal of Surety Co.)
By W. B. GILHAM,
Resident Vice-president.
Attest: EVA QUARNSTROM.
(Corporate Seal)

Countersigned:

W. B. GILHAM,
Resident Agent.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

JOHN H. McNARY,
Judge of the United States District Court for the District of Oregon.

Filed April 14, 1931. [354]

AND AFTERWARDS, to wit, on the 14th day of April, 1931, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [355]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To G. H. Marsh, Clerk of the Above-entitled Court:

You will please make up the transcript on appeal in the above-entitled case, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, and you will please include in such transcript on appeal the following and no other papers and exhibits, to wit:

1. Complaint as amended at the trial.
2. Answer of defendant, Great Northern Railway Company.
3. Motion for dismissal as to defendant, Spokane, Portland and Seattle Railway Company.
4. Order of dismissal as to defendant, Spokane, Portland and Seattle Railway Company.
5. Reply to answer of defendant, Great Northern Railway Company.
6. Verdict.
7. Judgment.
8. Motion for a new trial and in arrest of judgment.
9. Order denying defendant's motion for a new trial and in arrest of judgment.
10. Bill of exceptions.
11. Plaintiff's objections and amendments to defendant's proposed bill of exceptions.
12. Order allowing bill of exceptions as amended.
13. Petition for appeal and supersedeas.
14. Assignment of errors.
15. Order allowing appeal.
16. Undertaking on appeal.
17. Citation on appeal.
18. Copy of this praecipe as served upon counsel.

Very respectfully yours,

CHARLES A. HART,

FLETCHER ROCKWOOD,

CAREY, HART, SPENCER & McCULLOCH,

Attorneys for Defendant and Appellant Great Northern Railway Company.

Filed April 14, 1931. [356]

AND AFTERWARDS, to wit, on Wednesday, the 27th day of May, 1931, the same being the 68th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [357]

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 27, 1931—ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

On motion of the defendant the Clerk of this court is ordered to withdraw the original exhibits introduced into evidence in the above-entitled case from the file and transmit said original exhibits to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, together with the appeal papers in this case.

JAMES ALGER FEE,
United States District Judge.

Dated: May 27, 1931. [358]

[Title of Court and Cause.]

CITATION ON APPEAL.

To W. G. Shellenbarger, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at

San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Great Northern Railway Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment in said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this —— day of April, in the year of our Lord one thousand nine hundred and thirty-one.

JOHN H. McNARY,
Judge. [359]

State of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 14th day of April, 1931, by receiving a copy thereof, duly certified to as such by Fletcher Rockwood, of attorneys for defendant.

MALARKEY, DIBBLE & HERBRING,
Attorneys for Plaintiff.

Filed Apr. 14, 1931. [360]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do

hereby certify that the foregoing pages, numbered from 2 to 358, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which W. G. Shellenbarger is plaintiff and appellee and Great Northern Railway Company, a corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $33.80, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 28th day of May, 1931.

[Seal] G. H. MARSH,
Clerk. [361]

[Endorsed]: No. 6482. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Appellant, vs. W. G. Shellenbarger, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed June 1, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation
Appellant
vs.
W. G. SHELLENBARGER
Appellee

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon

CHARLES A. HART
FLETCHER ROCKWOOD
CAREY, HART, SPENCER & MCCULLOCH
1410 Yeon Building, Portland, Oregon
Attorneys for Appellant

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation
Appellant
vs.
W. G. SHELLENBARGER
Appellee

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE

The judgment appealed from in this action is one for damages for personal injuries. Appellee, the plaintiff below, was a passenger on one of appellant's trains. He stepped or fell through an open vestibule while the train was in motion.

The accident happened as the train slowed down for the purpose of taking a siding at a station in eastern Montana. One of the train crew had opened a vestibule door preparatory to alighting for the

purpose of closing the switch. He was standing at the opening but was not observed by plaintiff; it is plaintiff's contention that a sudden lurch of the train caused him to fall through the opening.

The complaint was drawn upon the theory that the train had taken the siding at an excessive rate of speed and that the result was an unusual and extraordinary lurch. This, together with the charge that the vestibule door was improperly left open without warning to plaintiff, was the negligence relied upon in the complaint. (Transcript of Record, pp. 5-6, 33).

At the opening of the trial plaintiff conceded that the train had not reached the siding at the time of the accident, and the court permitted an amendment changing the charge of negligence to excessive speed of the train "at a time when the train was about to enter a crossover." This was explained by counsel in the following words:

> "I wish to amend by stating that as they were about to take the siding and slowing down the train for the purpose of later entering the siding, they so carelessly and negligently operated the train as to cause it to give an unusual and unnecessary lurch, thereby causing the plaintiff to lose his balance and fall." (Transcript, p. 33.)

In response to a question from the court, counsel for plaintiff added:

> "the lurch must have been caused by the improper operation of the train for the purpose of

slowing down to take the crossing." (Transcript, p. 33).

The court submitted the issues of negligence to the jury, overruling a motion for a directed verdict, and there was a verdict of $18,480 upon which judgment was entered. Appellant moved for a new trial on the ground that certain charges of negligence should have been withdrawn from the jury, and upon the further ground that the verdict was excessive. The learned judge who presided at the trial died before passing on the motion and the motion was later disposed of adversely to defendant by another judge of the court, under the provisions of Section 28-776, United States Code Annotated.

Appellant seeks reversal of the judgment and the dismissal of the action on the ground that there was no substantial evidence to go to the jury upon any of the issues of negligence involved; the trial court should have granted the motion of defendant to direct a verdict. Appellant also assigns error in the failure to withdraw certain charges of negligence from the jury and in the failure of the trial court to set aside the verdict as excessive. If it can be said that there is some evidence of negligence to support one or more of plaintiff's charges so that the trial court was right in not directing a verdict for defendant, the judgment should, nevertheless, be set aside and a new trial granted because of these errors.

SPECIFICATIONS OF ERROR

1. The District Court erred in denying the defendant's motion for a directed verdict in its favor, as follows:

> "The defendant at this time moves the Court for a directed verdict in its favor on the ground that there is no evidence of any excessive speed, and no evidence of any excessive or unusual lurch of the train; on the further ground that the evidence fails to prove it was negligent in any particular alleged with respect to the condition of the vestibule, as to lights, opening, or method of safeguarding the vestibule; that there is no evidence from which it can be determined that any alleged act of the defendant was the proximate cause of plaintiff's injury—of the accident and his resulting injury. * * * " (Record, pp. 26, 328).

2. The District Court erred in refusing to give to the jury defendant's requested instruction No. II, as follows:

> "There is no evidence from which you may find that the speed of the train was excessive and negligent." (Record, p. 27).

3. The District Court erred in refusing to give to the jury defendant's requested instruction No. III, as follows:

> "I charge you that there is no evidence presented in this case that there was a lurch of the train at the moment that the plaintiff fell from the train. The entire matter covered by the allegations relating to the lurching of the

train is withdrawn from your consideration." (Record, pp. 27-28).

4. The District Court erred in refusing to give to the jury defendant's requested instruction No. IV, as follows:

> "I direct you that there is no evidence from which you can find that the defendant was at fault in respect to the condition of the vestibule and the methods used for guarding the open vestibule. Consequently all questions of negligence of the defendant on the condition of the vestibule and the methods used to protect the opening are withdrawn from your consideration." (Record, p. 28).

5. The District Court erred in refusing to give to the jury defendant's requested instruction No. IV-a, as follows:

> "I instruct you that there is no evidence in this record from which you can find that the trap door of the vestibule, at the place where the accident occurred, was raised; in other words, there is no evidence that the steps were uncovered." (Record, p. 28).

6. The District Court erred in denying the defendant's motion for a new trial, based upon the ground, among others, that the damages awarded by the verdict of the jury to the plaintiff are excessive and appear to have been given under the influence of passion and prejudice. (Record, pp. 18, 22, 25).

ARGUMENT

Appellant's first specification of error goes to the merits. Appellant believes that there was no substantial evidence upon any of the charges of negligence relied upon and that the trial court should have directed a verdict for defendant. The remaining specifications of error are assigned as grounds for setting aside the judgment and granting a new trial, upon the assumption that some evidence was adduced which justified submission of the case to the jury. We shall consider first the question presented by the first specification of error.

I.

The charges of negligence finally relied upon by plaintiff and to which the plaintiff's evidence was addressed, are the following:

1. That the train was operated at an excessive rate of speed in view of the fact that it was approaching a point where it would leave the main line and go upon a side track.
2. That the train was operated in such manner as to cause an unusual and unnecessary lurch.
3. That the vestibule door and steps of a car were allowed to remain open and unguarded, without proper lighting, and without warning or notice to plaintiff, at a time when the train was in rapid motion between stations.

The testimony offered in support of these allegations makes the accident to plaintiff one extremely difficult of explanation. He fell or was thrown or

inadvertently stepped through a side vestibule doorway, notwithstanding the fact that the trap or platform covering the steps was in place and a brakeman stood looking out the vestibule doorway in a position at least to partly block the opening. Up to the time of the amendment at the trial, plaintiff's explanation of the accident was that the sudden side sway caused by the excessive speed at which the train took the side track threw him from the train. The statement upon which the case went to the jury was that plaintiff lost his balance because of a sudden lurch of the train which caused him to fall *forward;* there was no testimony of any swaying which could possibly explain plaintiff's actions as he moved from his place of safety across the trap or platform and stepped or fell from the train.

The case turns upon the testimony of plaintiff himself, supplemented by the testimony of the brakeman who stood in the vestibule. Other testimony was offered in attempted corroboration as to the lurch of the train and the opening of the vestibule, but for reasons which we shall presently state, this testimony was without evidentiary value.

Viewed in the light most favorable to plaintiff, the proof of negligence upon which the verdict rests, is as follows:

Plaintiff had been riding in the rear car of the train and late in the evening started forward to his

own coach intending to go to bed. As he walked through the rear car he noticed the usual swaying of the train, stating that "I had to be careful about that." When he got to the vestibule between the rear car and the next preceding car, he noticed what seemed to be "more than the usual movement to the train", and when he was passing through the vestibule and was about to go into the next coach, he says there was a sudden lurch of the train that threw him; his statement was, "I lunged forward." He had no other recollection of how he left the train, but was conscious of going through space without knowing whether he had come in contact with either side of the vestibule or with any part of the train. The vestibule was well lighted, but plaintiff did not observe any open vestibule door nor did he notice that a brakeman stood in the opening. (Record, pp. 97-100, 279). In explaining the lurch referred to he said (Record, pp. 99-100):

> "Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of the car was such that you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronger—well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time."

In response to careful questioning at the time of a medical examination before the trial, plaintiff's explanation of the accident was that he was walk-

ing along the aisle of a moving train, and suddenly remembered nothing until he awoke in a hospital. (Record, pp. 169, 184, 186).

The brakeman who witnessed the accident had been seated in the observation car of the train. When the rounding of a curve indicated the approach to Saco station, at which the train was to take a siding to allow a westbound train to pass, the brakeman arose and went forward to the rear end of the next preceding car. He opened the vestibule door on the left side but kept the platform or trap (covering the car steps) down; he used this particular opening and not the vestibule door of the adjacent observation car, *because the latter was so constructed that he could not have opened the vestibule door without first raising the platform or trap.* His purpose was to drop off the train as soon as the car passed over the switch, swinging the vestibule door shut behind him, so that he might close the switch in the main line after the train had cleared it. (Record, pp. 273, 281).

While waiting for the train to enter the side track the brakeman stood facing out and looking forward toward the engine of the train, his body blocking the opening. His left hand rested on the brake lever on one side, and his right hand, raised to the level of his shoulder, extended across the opening and rested against the door on the other side. (Record, p. 281).

While in this position he suddenly felt a hand laid on his right forearm. His arm was not gripped but there was just ordinary pressure such as might be used merely to attract attention. The brakeman dropped his arm so that he might look around and as he did so a figure walked past him and stepped off into the dark. The brakeman made an effort to reach for him but could not get hold of him. There was no indication that the man was falling; his arms were not extended and he gave no impression of attempting to recover his balance. His movement was "just as though anyone would walk along." (Record, pp. 282-283).

There was a dome light on the left side of the vestibule where the accident happened, as well as on the right side. Both of these lights were burning. (Record, p. 279). The photographs of the car vestibule, Exhibits C, D, E, F, G, H, I and J, make clear that it would be almost impossible for anyone to pass another person standing in the opening unless the latter stepped aside or changed his position to some extent; at least, a body could not be thrown through the opening without striking against anyone standing in the doorway.

In examining this evidence to determine whether it makes out a *prima facie* case of negligence, two rules particularly applicable in the federal courts are to be kept in mind:

1. The case is not to be submitted to the jury merely because some evidence has been introduced by the party having the burden of proof, unless that evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. Where all of the substantial evidence is one way, the question presented is one of law and the trial court should direct a verdict. A scintilla of evidence will not support a verdict in the United States courts.

Larabee Flour Mills Co. v. Carignano, 49 Fed. (2nd) 151.

Gunning v. Cooley, 281 U. S. 90.

A. B. Small Co. v. Lamborn & Co., 267 U. S. 248.

Improvement Company v. Munson, 14 Wallace 442.

2. Upon a motion to direct a verdict all conflicts in the evidence are to be resolved against the defendant. But this does not mean that the testimony of a witness for defendant, not in conflict with plaintiff's evidence, can be disregarded. No different rule is applicable merely because such a witness may be an employe of the defendant, in the absence of circumstances justifying countervailing inferences or suggesting doubt as to the truth of the statements made, provided, of course, that the evidence is not of such a nature as fairly to be open to challenge as suspicious or inherently improbable.

Chesapeake & Ohio Ry. Co. v. Martin (decided April 13, 1931), 51 Sup. Ct. 453.

The single incident in plaintiff's story upon which a claim of negligence could possibly be based, is the lurching of the train when plaintiff in passing from the observation car to the adjacent sleeping car had reached the platform of the sleeping car. Instead of entering the car he walked or was thrown several steps to the left and through the open vestibule doorway in which the train brakeman was standing. The claim of negligence in opening the vestibule door and leaving it unlighted and unguarded is wholly unsupported by any proof other than the fact that plaintiff left the train through this opening, and this is completely answered by the uncontradicted testimony of defendant's witnesses. There was no attempt made to prove the allegations of excessive speed.

We are to determine, therefore, (a) whether there is any substantial evidence of a violent and unusual lurch which could be said to be at least presumptively negligent; (b) whether upon the entire record it can be said that there is any substantial evidence to support the claim that plaintiff fell or was thrown from the train by reason of the lurch referred to; and (c) whether there is anything in the fact that plaintiff actually left the train through the open vestibule doorway, in the circumstances shown by the record, to justify an inference of negligence in opening the doorway and making such an accident possible.

(a) Insufficiency of Evidence to Prove Negligent Handling of Train:

Plaintiff's description of the movement of the train to which he attributed his fall was "an unusual amount of movement"; "a sudden lurch" that caused him to lunge forward; a "violent" movement, causing him to lose his balance, but "it was not a swaying." (Record, pp. 97-98, 99-100).

These descriptive phrases when not related to some interruption in the normal operation of the train, are wholly inadequate to raise any presumption of negligence. Many cases emphasize the distinction between an accident to a passenger and an accident to the train. The rule of *res ipsa loquitur,* applicable in cases of accident to the train, does not supply the necessary *prima facie* proof of negligence where nothing more is shown than the fact of the injury to the passenger following some sudden lurch or jar in the movement of the train. Trains cannot be operated without sudden and unexpected jolts and lurches, and evidence proving simply that an injury was sustained as the result of an unexpected lurch or jerk, does not make out a case of negligence.

Nor is the situation helped by the descriptive adjectives used in characterizing the jerk or jar. Obviously, anyone who loses his balance and falls believes that the sudden movement responsible was "unusual" or "violent". Testimony of this kind from

the person injured adds nothing whatsoever to the fact of the injury, and where the occurrence itself—the fall resulting from an unexpected movement of the train—creates no presumption of negligence, the characterization of the movement as something unusually severe or even violent, adds nothing substantial upon which a verdict could rest. This was the holding of the Supreme Court in *Gulf M. & N. R. Co. v. Wells,* 275 U. S. 455. The statement of a brakeman who tripped as he was endeavoring to board a train, that the engine gave an unusual jerk, more severe than the brakeman had ever experienced, was said to be an opinion which under the circumstances had no substantial weight. A verdict based upon this alone was set aside.

It is universally recognized that sudden jolts and jars, often severe enough to cause one to lose his balance, are unavoidable in the operation of fast passenger trains, however skillfully they may be handled; in many cases recovery for injuries has been denied where the evidence showed nothing more than an injury resulting from an unexpected movement of this kind, even though characterized by the injured party as unusual or extraordinary or violent or even "terrific".

An illustrative case is *Norfolk & Western Ry. Co. v. Birchett,* 252 Fed. 512. A passenger had fallen or had been thrown from a chair in the dressing room

of a sleeping car, the result of which she described as a "terrific" or "violent" lurch of the train. The court said:

> "The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. * * * * * * * * * * * * * * *
>
> " * * * The fact that she fell, under circumstances not seriously in dispute, does not make out a *prima facie* case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred."

The distinction between an accident to the train, implying or creating a presumption of negligence, and an accident only to the passenger, is noted in the *Birchett* case in the following language:

> "In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. (Citing cases). In the last named case (*Nelson v. Lehigh Valley R. Co.*, 50 N. Y. Supp. 63) it was said:
>
> "'But it does not follow as a logical conclusion that, because a passenger is shaken or disturbed in his seat by the movement or lurching of a car running upon a curved road, the imputation of negligence must necessarily arise.

> That a passenger may, in a greater or less degree, be shaken or jostled, under such circumstances, is a matter of common knowledge and experience. As an ordinary incident to railroad travel, it is a consequence of the operation of counteracting forces, and is to be expected to occur. The courts must take notice of that which is a matter of common knowledge or experience, and when the evidence fails to disclose the lack of the required measure of care, as judged by the light of such knowledge, in view of the attendant circumstances, it ought not to be left to the conjecture of a jury. The plaintiff must give some proof from which there may be a logical inference of negligence, and the mere happening of the accident is not sufficient for the jury'."

In *Delaney v. Buffalo R. & P. Ry Co.*, 109 Atl. (Penn.) 605, a passenger fell from her chair as the result of a lurch which she described as "terrific". The court held that no negligence arose from the fact of the accident even though caused by a sudden movement of the train which the injured person thought exceptionally severe. Quoting from the decision:

> "In the present case no defect was shown in the appliances of transportation or manner of operation; on the contrary, it affirmatively appeared that the track, train, and all appliances were in first-class condition, and the operation free from fault, and nothing happened to the track or train; so the burden of proving negligence rested upon the plaintiff, and it was not met. An injury to a passenger raises no presumption against the carrier, unless the acci-

> dent is connected in some way with the means of transportation. (Citing cases). And the situation is not changed by the fact that plaintiff's evidence describes the lurch or jolt as 'terrific'. That a passenger fell from her chair from the mere movement of the car of a fast train does not make out a *prima facie* case of negligence, and her mere characterization of the movement as a terrific or violent lurch adds nothing from which negligence can be legitimately inferred."

The same rule was applied by the Supreme Court of Washington in the case of *Valentine v. Northern Pacific Ry. Co.,* 70 Wash. 95, 126 Pac. 99. Plaintiff's case rested upon her testimony that there was a violent lurch of the train as the result of which the injury was sustained. The court in holding that the issue of negligent operation should have been taken from the jury, said:

> "Moreover, there was no evidence to sustain either charge. Mrs. Valentine testified that the car gave a violent lurch, but there was no evidence that the lurch was so violent as not to be accounted for except upon the theory that the roadbed was defective or that the train was improperly operated. It might have resulted from rounding a curve or passing a switch. Here again the rule of *res ipsa loquitur* has no application. That rule can only be invoked where the accident, in the light of ordinary experience, is not capable of explanation, except as resulting from negligence."

In *Wile v. Northern Pacific Ry. Co.,* 72 Wash. 82, 129 Pac. 89, the Supreme Court of Washington said:

> "The law cannot, however, blind itself to the common facts of every day experience; and it takes knowledge of the fact that with the highest care known to modern railroading the best-built Pullman or drawing room car will lurch and sway, bringing a risk of injury to the passenger, which he assumes, because scientific railroading knows no way to avoid it."

In *Norfolk & Western R. Co. v. Rhodes,* 63 S. E. (Va.) 445, the court held that testimony by plaintiff's witnesses that there was a rocking or lurching which was unusual and extraordinary, did not make a *prima facie* case of negligence. The court said:

> "In this case there is no direct proof of negligence, nor can negligence be reasonably presumed from the facts and circumstances disclosed by the record. It is a matter of common knowledge, as well as shown by the record, that trains or cars, in passing rapidly over curves in the road, lurch, rock, or swing, and that this is unavoidable. * * *
>
> "It is true that the plaintiff and one of his witnesses express the opinion that the rocking or lurching when the plaintiff was injured was unusual and extraordinary, but they testify to no facts which show that it was unusual or extraordinary. * * * The mere fact that the plaintiff, who did not have hold of anything, was thrown or fell in the way he described does not show that the movement of the train was unusual."

A similar case is *Foley v. B. & M. R. R.,* 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076. Witnesses described the speed of the train at the time of passing over a cross-over switch as "swift", and the jar

or lurch as "quite violent", "terrible", "awful", "very severe", and "unexpected". Upon the authority of earlier Massachusetts cases, the court held the evidence insufficient to show any negligent act on the part of the defendant. As to the characterizations of the lurch of the train by the witnesses, the court said:

> "Mere expletive or declamatory words or phrases as descriptive of speed or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real character of the fact respecting which they are used."

See, also, *Denver & Rio Grande R. Co. v. Fotheringham,* 68 Pac. (Colo.) 978, in which it was held that an accident to a passenger presumes the want of care and shifts the burden of proof to the carrier only when the injury results from an accident to the appliances, and *Elliott v. C. M. & St. P. Ry. Co.,* 236 S. W. (Mo.) 17, in which it was held that testimony describing a sudden movement of the train as "an awful jolt and jar", and "the worst I ever witnessed", in itself was insufficient to sustain a verdict.

The decision of this court in *Southern Pacific Company v. Hanlon,* 9 Fed. (2nd) 294, is in entire

harmony with the cases discussed. In the *Hanlon* case proof of an accident to a passenger, resulting from a sudden jerking of the train, was held sufficient to shift the burden of proof to defendant, but it appeared without contradiction that there was an occurrence which interrupted the normal handling of the train. Something had happened to the train which does not happen in the ordinary course of train operation. There was a very sudden stop as the result of an application of the emergency brakes. The court held that this required explanation and left to the jury the sufficiency of defendant's explanation.

The point stressed by these cases is that the burden of proving negligence when there was no accident to the train, is upon the passenger, and that this burden is not sustained by proof of a sudden or even violent lurch or jerk which might as well be attributable to the normal movement of the train as to negligent operation. Where the record has nothing but the injured person's description of the lurch, even though characterized as an unusual or violent movement, common knowledge that such movements are unavoidable in normal train operation, makes this proof inadequate; to submit the issue to the jury in such circumstances is to leave the matter to conjecture. *Norfolk & Western R. Co. v. Birchett, supra.* When it also apears, as it does in many of the cases, that others in the train were

not affected by the lurch complained of, and that the train continued on its way without notice of the incident, the question of negligence is no longer even conjectural; the necessary conclusion is that the lurch or jar was merely an incident of the usual train operation.

In *Delaney v. Buffalo etc. R. Co., supra,* the court noted the fact that the jolt had not disturbed the dishes in the buffet end of the car and that no other person had been disturbed. It was held that in such circumstances "there is no presumption of negligence arising from the use of the words 'sudden jerk'." The same rule was applied in *Nelson v. Lehigh Valley R. Co.,* 50 N. Y. Supp. 63, where the evidence showed that no one but the plaintiff had fallen as the result of the sudden lurch complained of.

In the case at bar the record shows no interruption to the operation of the train at the time of plaintiff's accident. No other passenger is shown to have been affected in any way by the sudden movement complained of. Two passengers riding in the car next to the one from which plaintiff fell, knew of nothing out of the ordinary until told of the accident. (Record, pp. 214, 238). None of the train crew knew of any unusual jar or jerk prior to the time when the engineer was signaled to stop after plaintiff had fallen from the train. In fact,

the Pullman conductor, who was interested in seeing that the passengers enjoyed themselves (this was a special train carrying a party of Knights Templar to a convention), stated that dancing continued in the parlor car in the middle of the train without any interruption, and that his first word of any accident came when the train stopped at Saco station. (Record, p. 271).

There was evidence given on behalf of plaintiff by other passengers in the observation car at the end of the train and in the adjoining sleeping car, of a jerk, or rather of two jerks, severe enough to be noticed. There is no corroboration of plaintiff's statement in this testimony, however. Immediately after plaintiff fell from the train the brakeman who saw him fall signaled the engineer to stop the train. The brakes were applied and the train came to a stop, and after starting up again a second stop considerably more sudden than the first was made. The jerks described by the passengers testifying for plaintiff (if these characterizations can be given any greater weight than the statement of plaintiff himself), clearly were those resulting from the sudden application of the brakes after plaintiff's accident became known. (Record, pp. 283, 214, 224, 225, 244, 245, 263). We summarize below the statements made by these witnesses:

Two passengers who were riding on the rear platform of the observation car, learned of the accident

to plaintiff when a brakeman came through the car and stated that a man had fallen from the train. Immediately before that these passengers noticed a lurch of the train. One of them states that "the movement caused me to go forward in my chair" (Record, p. 39); the other said that he noticed a change in the rhythm of the train's progress and abrupt change in the motion of the train (Record, pp. 67, 74).

Three passengers were playing cards in a compartment in the car next ahead of the observation car. Someone opened the door of their compartment and told them that a passenger had fallen from the train. Just a few seconds before this announcement there was a jerk or lurch of the train. One of these witnesses described it as "a rather violent lurch—a lurch forward" (Record, p. 81); another said that it was severe enough to throw her forward against the card table and that only the card table stopped her from falling to the floor (Record, p. 62); the third said that there was a very heavy lurch which kind of upset the card game, just prior to the time when they were told that a passenger had fallen from the train (Record, pp. 148, 149).

The cases to which we have referred make clear that the statements of these witnesses can be given no greater weight than the statement of plaintiff himself. It would be pure conjecture to say from

their testimony that the jerk or forward lurch described was not one which might be encountered on any fast passenger train, but was instead explainable only as the result of improper operation.

In any event, the record shows that immediately after plaintiff's fall from the train the brakeman pulled the signal cord and the engineer at once brought the train to a stop. Not receiving any explanation of the signal, the engineer started the train; immediately another signal was given and the train was again stopped, this time rather suddenly. Obviously, the jerking and lurching forward described by these witnesses and said by them to have been noticed immediately before they were told of plaintiff's accident, was that which followed the stopping of the train. Under these circumstances the jury could not properly be permitted to conjecture that the movement described by these passengers might possibly be the lurch which plaintiff claimed had preceded his fall from the train. No causal connection appeared between the movement described by these witnesses and the accident to plaintiff; on the contrary, there is a compelling inference that the jerks they described came from the sudden stopping of the train after it had become known that plaintiff had fallen from the train.

We submit, therefore, that the record contains no substantial evidence to show negligence in the handling of the train. At most, plaintiff's claim in

this respect is supported only by his statement that he fell because of an unusually severe lurch of the train. The movement described, even though characterized as unusual, was not one explainable only upon the assumption that there had been defective or improper train operation. The burden of proof to show negligence of this kind was upon plaintiff and his testimony was inadequate to sustain that burden.

(b) Alleged Lurch Not Proximate Cause of Accident:

What has been said accepts at full face value the statement of plaintiff that he fell or was thrown from the train following the lurch he described, and takes no notice of the fact that there was an eye witness to the occurrence. In examining the question of proximate cause, however, the court will find that there are serious gaps in the account given by plaintiff, and of necessity the test to be applied—whether there is any substantial evidence in the record to connect plaintiff's fall with the lurch of the train complained of—requires consideration of the testimony of the eye witness to the accident. To the extent that the testimony of this witness conflicts with that given by plaintiff, it was properly disregarded by the trial court upon defendant's motion for a directed verdict and is not to be considered here. To the extent, however, that this testimony explains and supplements rather than contradicts

plaintiff's story of his accident, it was entitled to full consideration in determining what is shown by the record and whether there was substantial proof of the charge that plaintiff was thrown from the train.

The fact that this eye witness was an employe of defendant does not change the situation. Unless there were circumstances which justified countervailing inferences or which suggested doubt as to the truth of the testimony, or unless the evidence was of such nature as fairly to be open to challenge as suspicious or inherently improbable, it was entitled to full credit and the trial court could not properly disregard it or submit the case to the jury upon the assumption that the jury was at liberty to disbelieve it because it came from an employe of defendant.

This is the rule of *Chesapeake & Ohio Ry. Co. v. Martin,* 51 Sup. Ct. 453, decided April 13, 1931. In this case the Supreme Court said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

The decision of the Supreme Court in this case leaves no room for doubt that testimony of an employe of a party which is positive and direct and

not incredible upon its face, must be accepted. And if the record, with due consideration given such testimony, has no substantial support for plaintiff's claim, the trial court should direct a verdict for defendant. We quote below the Supreme Court's review (in *C. & O. Ry. Co. v. Martin, supra*) of the cases upon this question:

> "It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. Hauss v. Lake Erie & W. R. Co. (C. C. A.) 105 F. 733; Illinois Cent. R. Co. v. Coughlin (C. C. A.), 132 F. 801, 803; Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102; Second Nat. Bank v. Weston, 172 N. Y. 250, 258, 64 N. E. 949; Johnson v. N. Y. C. & H. R. R. R. Co., 173 N. Y. 79, 83, 65 N. E. 946; St. Paul Cattle Loan Co. v. Houseman, 54 S. D. 630, 632, 224 N. W. 189; M. H. Thomas & Co. v. Hawthorne (Tex. Civ. App.), 245 S. W. 966, 972; Dunlap v. Wright (Tex. Civ. App.),

280 S. W. 276, 279; Still v. Stevens (Tex. Civ. App.), 13 S. W. (2d) 956; Marchand v. Bellin, 158 Wis. 184, 186, 147 N. W. 1033. Of like effect, although in a different connection, see, also, Roberts v. Chicago City Ry. Co., 262 Ill. 228, 232, 104 N. E. 708; Veatch v. State, 56 Ind. 584, 587, 26 Am. Rep. 44; Marq., Hought. & Ont. R. R. v. Kirkwood, 45 Mich. 51, 53, 7 N. W. 209, 40 Am. Rep. 453; Berzevizy v. D., L. & W. R. R. Co., 19 App. Div. 309, 313, 46 N. Y. S. 27; Miller's Will, 49 Or. 452, 464, 90 P. 1002, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277.

"In Hull v. Littauer, *supra,* the doctrine that the question of credibility of a witness must be submitted to the jury was held to be not an inflexible one, even though such witness be a party to the action. In that case the defendants moved for direction of a verdict in their favor, which was resisted by plaintiff on the ground that the proof upon which the motion was based rested upon the evidence of interested parties. The court, nevertheless, sustained the motion. On appeal, the state Court of Appeals affirmed this judgment, saying (page 572 of 162 N. Y., 57 N. E. 102):

" 'It is true that the evidence to establish the entirety of the contract was given by the defendants, but the rule which the plaintiff invokes is not applicable to such a case as this. Generally, the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness or accuracy is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his state-

ments,—it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness. Though a party to an action has been enabled, since the legislation of 1857 (chapter 353, Laws 1857), to testify as a witness, his evidence is not to be regarded as that of a disinterested person, and whether it should be accepted without question depends upon the situation as developed by the facts and circumstances and the attitude of his adversary. In Lomer v. Meeker, 25 N. Y. 361, where the defense to an action upon a promissory note was usuary, and the indorser gave the evidence to establish it without contradiction, it was said that "it was the duty of the court in such case to dismiss the complaint, or nonsuit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. * * * The argument is that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony." More recently, in Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109, Judge Danforth, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said "the mere fact

that the plaintiff, who testified to important particulars, was interested, was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn".'

"In Hauss v. Lake Erie & W. R. Co., *supra,* a direction of the trial judge to find for the defendant was sustained, although the motion rested upon the testimony of the conductor of the train. The court put aside the objection that the witness was an employee of the defendant and had an interest to show that he had performed his duty and a motive falsely to represent that he had done so, saying (page 735 of 105 F.):

"'The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony.'

"And at page 736 of 105 F.:

"'* * * Nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth.'

"In M. H. Thomas & Co. v. Hawthorne, *supra,* at page 972 of 245 S. W., the rule is thus stated:

"'A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in

> it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncontradicted testimony of interested parties, when it is positive and unequivocal and there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas'."

The testimony of the brakeman who witnessed the accident to plaintiff in the case at bar, supplied certain important facts as to which plaintiff's testimony was silent; it gave the detail which was missing from plaintiff's story. The court will search the record in vain for any circumstance which throws the slightest suspicion or doubt upon the testimony of this witness. It was direct and positive, entirely credible upon its face, and in the main uncontradicted. Therefore upon a motion for directed verdict, it was the duty of the trial court to give this testimony equal weight with plaintiff's testimony, in determining whether there was any substantial evidence in the record to support the charge that

plaintiff fell from the train as the result of a sudden and unexpected lurch or jerk. We summarize below the testimony of plaintiff and of the eye witness to the accident, upon this question.

Plaintiff's statement is that he lunged forward after a sudden lurch of the train. His story as to what happened next is as follows (Record, p. 98):

> "I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember."

In response to a question from his counsel as to the last thing he could remember *before the accident,* plaintiff said(Record, p. 98):

> "I was going through space. Practically that is the only way I can express it."

It will be remembered that immediately before plaintiff was walking from one car to another, presumably on a line approximately equally distant from the right and left vestibule doorways; he was about to enter the door of the sleeping car itself when the accident happened. To leave the train through the left vestibule doorway it was necessary to proceed several steps, perhaps three or four feet, to the left in order to get from the middle of the car

platform to the left doorway. The vestibule space to be traversed is narrow; there are objects on each side, a handhold, brake lever, etc., and the entire vestibule space was well illuminated by a dome light.

Plaintiff has no explanation whatsoever of his movements from the time he lunged forward. He was then not near the left vestibule opening but was in the middle of the platform about to enter the car. Unless there was a mental lapse at this moment there would seem to be no reason why plaintiff could not explain how he traversed the platform from its center to the left edge, and particularly how he got through the opening without touching objects on either side and without making any effort to save himself. Upon direct examination plaintiff was asked whether he observed anything "except the ordinary lights of the vestibule." His answer was that he had noticed only "just the ordinary passage between the cars." (Record, p. 99). He did not observe that a vestibule door was open and did not see anyone standing in the doorway. (Record, p. 98). He did not undertake to deny that the brakeman might have been standing in the vestibule but merely said that "if there was any in there I didn't know; I didn't see him." (Record, p. 109). And when asked in the course of the medical examination for an explanation of the accident, he stated that he was walking along the aisle of a moving train

and suddenly remembered nothing until he awoke in the hospital. (Record, p. 169).

The brakeman's testimony is that he had opened the vestibule preparatory to and as a part of a necessary train operation, leaving the trap or floor covering the steps leading from the platform, in place. (Record, pp. 273, 281). There was a lighted dome light overhead so that the vestibule was well illuminated. (Record, pp. 279, 300). From the time of opening the vestibule door until the moment of the accident, the brakeman stood practically in the center of the opening so that until he moved aside, it would have been impossible for anyone to get through the opening, at least if moving involuntarily, without striking him. (Record, p. 281, Exhibits C to J, inclusive).

None of this testimony is in conflict with that given by plaintiff. His statement is that he lunged forward (as the result of a lurch of the train) while walking toward the entrance to the sleeping car. He knew nothing of the circumstances described by the eye witness and did not undertake to deny them. We exclude from this review of the brakeman's testimony his statement that while standing in the vestibule doorway a hand was laid on his arm, and that when he turned to see what was wanted, plaintiff walked past him and stepped off the train. This was denied by plaintiff on rebuttal; plaintiff stated

that it was not the fact that he had walked or stepped from the train. (Record, p. 328).

This is the record which was before the trial court at the time of the motion for a directed verdict, and the question for consideration here is whether there is in this record any substantial evidence from which it may fairly be inferred that the "lunge forward" which plaintiff described, was responsible for his fall from the train. Of first importance is the fact that plaintiff offered no explanation of his fall from the train other than that the statement that as he was walking toward the entrance of the sleeping car he lunged *forward,* that is, in the direction in which he had been walking, and then was conscious of going through space. Whether this statement, considered apart from the testimony later introduced by defendant, would support the desired inference that he fell out the left vestibule doorway as the result of this lunge forward, might well be doubted.

But when plaintiff's statement is tested in the light of facts proven by uncontradicted testimony of an eye witness, the inference plaintiff seeks to draw and upon which his case rests, is utterly impossible. These facts—the well lighted vestibule, with the trap or platform over the steps in place, the handhold and brake lever available on each side of the narrow space, the distance to be traversed over the platform

from the center line of the train to the vestibule doorway, and, finally, the presence of the brakeman in the doorway in a position that required him to move to one side to permit anyone to pass—preclude the possibility of an inference that the lurching of the train actually lifted plaintiff into the air so that he was hurtled across the platform and through the vestibule doorway without touching any of the objects on either side, or the man whose body blocked the opening.

It must be kept clearly in mind that plaintiff's case is wholly dependent upon this inference. There was no testimony that he had stumbled down unguarded steps or that his loss of balance at the time of the "lunge forward" caused him to pitch sideways across the platform and out the left vestibule doorway. No attempt was made to prove any of the circumstances (and if plaintiff was in possession of his senses these circumstances must have been known) to connect the lunge forward with the fall from the train. Nothing was shown which could justify a finding that the condition of the vestibule, the trap or platform covering the steps, and the position of the brakeman were not exactly as the brakeman described them. The case rests upon the statement that at one moment plaintiff was lunging forward in the middle of the car platform, and the next moment was in the air moving through space away from the train. Obviously, some explanation of this

is necessary. The facts are given by the uncontradicted testimony of the brakeman, and in the light of these facts the inference upon which plaintiff relies to connect his accident with the alleged negligence, was not one which the jury could be permitted to draw.

The facts shown by the record strongly suggest that plaintiff must have paused in his walk from one car to the other and then, momentarily losing his sense of direction, proceeded through the left vestibule doorway, touching the arm of the brakeman as a request to be allowed to pass, in the belief that he was entering the car itself. But defendant's right to a directed verdict did not turn upon its ability to explain just how plaintiff came to fall from the train. Plaintiff had the burden of proof, and if his evidence failed to sustain his theory that a lurch of the train not only caused him to lunge forward but actually lifted him into the air and catapulted him through the narrow space from the center of the car platform to and through the vestibule doorway, without touching any of the objects on either side or the man whose body blocked the opening, then the injuries resulting were not sufficiently connected with the alleged negligence and a directed verdict should have been granted.

We are not called upon to determine whether plaintiff stepped from the train as the result of a momentary mental lapse, as might be inferred by

his own statement during the medical examination. We are concerned here with the sufficiency of his proof in the light of the uncontradicted facts, brought into the record by defendant, to establish the proximate cause claimed. These facts make impossible the desired inference that plaintiff was thrown sideways through the vestibule doorway as the result of the forward lurch of the train. Without this inference there is no connection between the accident to plaintiff and the negligence alleged. If, notwithstanding the weight of authority to the contrary, the "unusual" lurch of the train can be considered presumptively negligent, a verdict for defendant should nevertheless have been directed for lack of proof that the alleged negligence relied upon was the proximate cause of the fall from the train.

(c) Negligence Not Inferable from Opening of Vestibule Doorway:

The claim of the complaint that a condition unsafe and dangerous to passengers was created by opening the vestibule doorway and that this opening was left unlighted and unguarded, and that no notice of this danger was given plaintiff, rests solely upon the fact that plaintiff left the train through this vestibule doorway. His own account of the accident includes no affirmative testimony as to the condition of the vestibule,—whether the trap cover-

ing the platform was in place, whether the vestibule was lighted, or whether the brakeman was in the opening. As to these matters he testified that he noticed only "the ordinary passage between the cars." (Record, p. 99).

The fact that plaintiff left the train through the vestibule doorway proves that the door was open, but does not prove that the vestibule was unlighted or that the opening was unguarded. Plaintiff's account of the accident permits of no inference as to this, because he professes to have noticed nothing prior to the lurch of the train, and thereafter, and following his "lunge forward", he was conscious only of going through space. This showing—the fact of the accident and the testimony given by plaintiff—leaves the matter open to conjecture; how plaintiff got from his place of safety across to the left vestibule door, whether the vestibule was lighted in the usual way, and whether there was anyone else there, are matters of speculation and no inference either way is justified.

But the record has other testimony which explains exactly what occurred. It is important to note that this testimony while in conflict with plaintiff's theory of liability, is not in conflict with plaintiff's testimony. The vestibule door had been opened, it is true, but for a necessary operating purpose. The trap covering the car steps was in place and the vestibule brightly lighted, and a brakeman stood in

the opening in the performance of his duty. These are proven facts, not contradicted either by what plaintiff said in his testimony or by the fact that he actually got by the brakeman and left the train through the vestibule opening. Plaintiff attempted a contradiction of the brakeman's statement as to just how this was accomplished; on rebuttal he was asked the single question whether it was true that he walked or stepped from the train and he answered that "It is not true." (Record, p. 328). In all other particulars the brakeman's testimony stands unchallenged, and must be accepted as fact under the rule of *C. & O. Ry. Co. v. Martin, supra.*

We are not unmindful of the fact that testimony was given by two passengers on the train to the effect that both the vestibule door and the trap were open. (Record, pp. 80, 147). But these witnesses were speaking of the condition they observed after the accident. A third witness noticed the open vestibule, but could not say whether the trap was open. (Record, pp. 59-60). These passengers had been playing cards in a compartment and when told of the accident went back to the observation car; when passing from one car to the other they noticed the open vestibule doorway. Immediately after the accident and before these people had reached the vestibule, signals had been given the engineer and the train was coming to a stop; the occupants of both the observation car and the sleeping car adjoining

had been told of the accident and several got off as soon as possible, perhaps without waiting for the train to come to a full stop, to go to plaintiff's aid. Obviously the conditions prevailing after the accident, with the train crew and passengers about to alight to seek for and to help the injured man, do not support the contention (if such contention is actually made) that the trap was open and the car steps unguarded at the time plaintiff fell from the train.

On this record it is impossible to infer negligence from the fact that the vestibule door was open while the train was still in motion, or from the fact that plaintiff in some manner left the train through the vestibule doorway. Necessarily vestibule doors must be opened occasionally for purposes of normal train operation even while the train is still in motion. Negligence cannot be inferred from this, at least when it appears that the train employe opening the vestibule remained at the opening; and the fact that some danger results to passengers even with the opening thus guarded, is not in itself sufficient to prove negligence.

Tudor v. Northern Pacific Ry. Co., 124 Pac. (Mont.) 276.

Union Pacific R. Co. v. Brown, 84 Pac. (Kan.) 1026.

Gayle's Administrator v. L. & N. R. Co., 173 S. W. (Ky.) 1113.

Amyot v. D. S. S. & A. Ry. Co., 214 N. W. (Mich.) 140.

Whether the brakeman's version of plaintiff's fall from the train be accepted or whether the matter be left to conjecture, there can be no dispute over the fact that when the accident happened the vestibule was brightly illuminated, the trap covering the car steps was down in place, and the brakeman was standing in the vestibule doorway, his body partly blocking the opening. He was engaged at the moment in the performance of a duty incident to train operation; he was looking out watching for the moment of passing the switch leading to the side track so that he might alight and close the switch. In this situation the fact that the vestibule door was open and that plaintiff in some manner got past the brakeman and fell from the train, implies no neglect of duty on the part of the carrier.

Appellant respectfully submits that the record presented to the trial court upon defendant's motion for directed verdict, had no substantial evidence to support any of the charges of negligence made by plaintiff. Defendant's motion should have been granted for this reason, and for the further reason that the occurrence upon which chief reliance was placed, whether negligent or not, was not shown to be the proximate cause of plaintiff's accident.

II.

At the close of the testimony, and after its motion for a directed verdict had been overruled, defendant requested the court to instruct the jury that there was an entire failure of proof of the charge of excessive speed in the operation of the train, and also that there was no evidence to support the claim that the steps leading from the car platform had been left open and unguarded. At the same time defendant asked the court to withdraw from consideration by the jury the charge of negligence in causing a lurch of the train, and the claim that the vestibule doorway had been improperly left open and unguarded. These requests were all denied.

We have discussed at length in the argument directed to the merits, the inadequacy of the evidence to sustain the claims of negligence in respect of the lurching of the train and the opening of the vestibule doorway. Appellant maintains that the record has no substantial evidence to support either of these charges of negligence and that the trial court erred in not withdrawing them from consideration by the jury, if upon any theory the case could properly have been submitted to the jury at all. There remain for consideration the specifications of error based upon the refusal of the trial court to instruct the jury that there was an entire failure of proof of the charges that (1) the speed of the train was ex-

cessive, and (2) that the steps leading from the car platform had been left open and unguarded.

Lack of Evidence of Excessive Speed:

The charge of excessive speed, as it appeared in the complaint originally, had reference to the movement of the train from the main track to the siding at Saco station. The train was thought to have lurched because it took the siding at an unduly high speed. In preparing for the trial, however, plaintiff's attorney found that the accident had occurred before the train had reached the siding, and the complaint was amended to charge a "high and dangerous and excessive rate of speed" in view of the fact that the train was then "approaching and about to enter upon and about to take a siding." (Record, pp. 5, 33).

It is questionable if the allegation in this form charges any breach of duty on the part of the carrier. The amendment apparently charges excessive speed as a ground of negligence, in addition to the alleged rough handling of the train, but the circumstances described,—the anticipated stop for the purpose of entering a siding,—suggest no reason for reducing speed while the train was still on the main line some distance away from the siding.

At any rate, no proof was made of any unusual or excessive speed in circumstances which required

slower operation. Expressions of the witnesses were that before the accident the train was running "at a good speed on a comparatively straightaway" (Record, p. 40); "we had been running rather fast, and were slowing down" (Record, p. 55); "they had been making about thirty-five miles an hour" (Record, p. 219).

Of course there is nothing in this testimony to justify any inference of negligence. Nothing more than ordinary train operation was shown, and since prior to the time of the accident no circumstance or condition appeared which necessitated slow running, there was no duty to operate the train at any lower rate of speed than that described by the witnesses.

Smith v. Chicago, N. S. & M. R. R., 193 N. W. (Wis.) 64.

Hoskins v. Northern Pacific Ry. Co., 102 Pac. (Mont.) 988.

While the jury was not directed to consider the speed of the train as an independent ground of negligence, the instructions given permitted the jury to find that negligently excessive speed was a factor in bringing about the lurch of the train complained of. (Record, p. 330). This clearly was error. The testimony quoted falls far short of proving any negligence in the matter of speed, and the court should have directed the jury, as requested by defendant, that the speed of the train was not an element to be considered.

Insufficiency of Proof of Open and Unguarded Car Steps:

The issues submitted to the jury did not specifically include the contention that the trap covering the car steps had been raised and the steps left open and unguarded. (Record, pp. 330, 334). However, this claim was made in the complaint (Record, pp. 5-6), and testimony designed to prove it was offered and received in evidence.

We have already reviewed this evidence and have pointed out that the circumstances made it of no value as proof of the condition prevailing at the time of the accident (*ante*, p. 42). When the passengers giving this testimony observed the vestibule and car steps, the train was coming to a stop. Many of those on board had learned of the accident and were preparing to alight as soon as possible in order to find plaintiff and give him help. The fact that the trap covering the steps may then have been up and the steps open cannot justify an inference that this condition prevailed when the accident happened.

This was the only evidence offered in support of the contention that the car steps were open and unguarded when plaintiff undertook to go through the vestibule from the observation car to the sleeping car. There was nothing whatsoever in plaintiff's story of his accident to support an inference upon this point. The facts must have been obvious to him

as he walked through the vestibule, but he noticed nothing and apparently could not tell whether in leaving the train he went down the car steps or across the trap or platform and out the opening above the trap covering the steps. The brakeman's uncontradicted testimony is that the trap had not been raised at all prior to the accident, and that he in fact was standing upon the trap covering the steps when plaintiff came through the vestibule.

Upon this record there was an entire failure of proof of the charge made in the complaint. If upon any theory there was a fact issue as to the lurch of the train or as to the opening of the vestibule door, the case should not have gone to the jury without defendant's requested instruction withdrawing from their consideration any question as to the condition of the car steps.

CONCLUSION

The judgment appealed from in this case imposes liability upon appellant in the sum of $18,480.00 for an accident which appellant could not possibly have prevented. The record clearly indicates that the jury was permitted to base its verdict upon the fact that plaintiff had fallen or had inadvertently stepped from a moving train, and that this had been made possible by a member of the train crew who had opened the vestibule door.

Appellant owed plaintiff and his fellow passengers a high degree of care in the operation of the train upon which they were riding, but it was not an insurer of their safety. The judgment in this case in practical effect holds appellant to the obligation of an insurer. If a presumption of negligence can possibly be said to have arisen from the fact that the accident was made possible by the opening of the vestibule doorway, any such presumption became, in the light of the direct, positive and uncontradicted testimony of the train employe responsible, a mere scintilla of evidence wholly inadequate to support a verdict.

The untimely death of the Honorable Robert S. Bean, after the submission of defendant's motion for a new trial and before the motion had been passed upon, deprived defendant of its opportunity to secure a careful and painstaking review of the record by the judge who had listened to the testimony. There was, of course, but a limited opportunity for such a review of the evidence when defendant's motion for a directed verdict was disposed of at the trial. Appellant believes that an examination of the record would have convinced the trial judge that there was no substantial evidence to sustain plaintiff's charges of negligence.

Through the death of the trial judge defendant also lost the right to a review, by the judge who heard the testimony, of the award of damages. Ap-

pellant believes that the verdict is so excessive as to indicate passion and prejudice on the part of the jury. Whether this is so is a question difficult to answer upon the record alone; ordinarily an appellate court has the benefit of the views of the trial judge who has granted or refused a new trial. Here the defendant's motion was necessarily disposed of upon the record alone, and the case comes here with nothing to indicate whether or not the trial judge who heard the case considered the verdict excessive. For this reason we shall not urge here the specification of error based upon the excessive award made by the jury.

Respectfully submitted,

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No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation
Appellant

vs.

W. G. SHELLENBARGER
Appellee

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon

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SUBJECT INDEX

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TABLE OF CASES AND STATUTES CITED—Continued.

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STATEMENT OF THE CASE

This action was commenced in the Circuit Court of Multnomah County, Oregon, and was removed by appellant to the United States District Court for the District of Oregon. It was brought to recover damages resulting from personal injuries sustained by appellee, at or near the town of Saco, in the State of Montana, while he was riding as a passenger on a special, non-schedule vestibuled passenger train, consisting of ten cars and an engine, and being controlled and operated by appellant.

The Spokane, Portland and Seattle Railway Company was made a party defendant along with appellant because appellee did not know, at the time the action was filed, which one of the two companies was in control of and operating the train. It appearing from the answer filed by appellant (Record, p. 10) that it admitted that appellant was in control of and operating the train at the time and place of appellee's injury, appellee took a voluntary non-suit as to said Spokane, Portland and Seattle Railway Company and the action proceeded against appellant, alone.

Appellee boarded the train at Portland, Oregon, on the morning of July 12, 1928, and his destination, as was that of the other passengers, was Detroit, Michigan. The very last car of the train or the one the farthest to the rear of the engine was an observation car and appellee's berth was a few coaches forward from said observation car. At about the hour of 10:30 o'clock on the night of July 13, 1928, appellee, who had been riding in said observation car, was in the act of walking therefrom to the coach next ahead, it being his intention to go to his berth and retire for the night, and while appellee was walking along the passage way in the vestibule between said two cars there was, as appellee contends, a sudden and unusual and extraordinarily violent lurch of the train, which caused appellee to lose his balance and to be thrown with great force through an open vestibule door and out on to the right-of-way.

The vestibule door in question was located on the lefthand side, as the train was proceeding, of the rear platform of the said coach, which appellee was desirous of entering, and in appellee's complaint it was alleged, among other things, that appellant negligently operated said train, thereby causing it to give said violent and unusual lurch and that appellant was further negligent in allowing said vestibule door and the steps or "trap" on the lefthand side of the rear platform of said coach to be open and exposed between stations and at a time when the train was not discharging or receiving passengers and was in rapid motion.

Appellant denied the negligence charged except that it admitted that said vestibule door was open and in its answer and by its testimony appellant sought to excuse said open vestibule door by contending that it was necessarily open to enable its rear brakeman or flagman to perform certain operating duties at that place in the train.

This contention was denied by appellee's reply and testimony was elicited from said rear brakeman and was given by other of appellant's witnesses and was offered and received in behalf of appellee, conclusively showing that said vestibule door and steps or "trap" need not, for any operating necessity, have been open at said time and place in the train and that the having of the same open was in direct violation of a standard operating rule of appellant.

It was also affirmatively alleged in appellant's answer that appellee was guilty of contributory negligence in that while said rear brakeman was standing at said open vestibule door appellee carelessly "proceeded" from the vestibule. This was denied by appellee's reply and constituted one of the issues of fact submitted to the jury.

The action was tried before the Honorable Robert S. Bean and, as stated by him in his instructions to the jury (Record, p. 336) the questions in the case were largely questions of fact for the jury's determination. Only two persons were on the rear platform of the said coach at the time appellee was injured, namely, said rear brakeman and appellee and, as to what transpired, the testimony revolved largely around their diametrically opposed versions. Appellee testified, and contends that the weight of the evidence preponderated to show, that he was thrown through said vestibule with such force and violence as to knock said rear brakeman to one side and plunge or hurl appellee "through space" and out on to the right of way. Said rear brakeman contended, on the other hand, and appellant sought to show, that appellee walked or stepped from the train.

At the conclusion of the evidence appellant interposed a motion for a directed verdict in its favor on the grounds and as shown at pages 328, 329 and 342 of the Record. Said motion was denied and the cause submitted to the jury, resulting in a verdict in favor

of appellee and from the judgment duly entered on said verdict appellant prosecutes this appeal. As will be shown in our argument, there is but one legal question presented for the decision of this Court and that is, whether the trial Court erred in denying appellant's motion for a directed verdict.

ARGUMENT

We desire at the outset to direct the Court's attention to the fact that, under the rules and decisions of this Court, the Record and appellant's brief present but one question for the determination of this Court, namely, whether the trial Court erred in denying appellant's motion to direct a verdict in its favor on the alleged ground that there was no proof of negligence *on the part of appellant,* sufficient to warrant the submission of the case to the jury.

Rule 24 of this Court provides, among other things, that appellant's brief shall contain a specification of the errors relied upon and intended to be urged and that errors not so specified will be disregarded, and it was held by this Court in *Wabash Ry. Co. v. Lindley, 29 Fed. (2d) 829,* at page 831, that assignments of error will be considered abandoned when not in the specifications of errors. Rule 10 of this Court provides, among other things, that exceptions to the instructions of the Court to the jury must be taken while the jury is yet at the bar and before the jury has retired to deliberate

on the case. Bearing in mind these considerations, it will be seen that the single question presented for review is as heretofore stated.

Assignment of Errors numbered 1 (Record, p. 342), constituting Specification of Error 6 (appellant's brief, p. 7), relates to the contention urged in appellant's motion for a new trial that the damages awarded by the jury are excessive and appear to have been given under the influence of passion and prejudice. Said Specification of Error 6 is expressly waived and abandoned by appellant in the following statement shown at page 51 of its brief: "For this reason we shall not urge here the specification of error based upon the excessive award made by the jury."

Assignment of Errors numbered 2 (Record, p. 342), constituting Specification of Error 1 (appellant's brief, p. 6) relates to said motion for a directed verdict, and will presently be considered at length. It should be noted, however, at this point, that appellant has waived and abandoned its former contention that said motion for a directed verdict should be granted because of the alleged contributory negligence of appellee. As shown at page 342 of the Record, one of the grounds assigned in said motion for a directed verdict was "that the evidence showed that the plaintiff was guilty of contributory negligence and that such negligence was a proximate cause of the accident." In said Specification of Error 1, shown at page 6 of appellant's brief, said ground for the direction of a verdict is deleted, and

there appears, in place of the ground just quoted from said Assignment of Errors 2, three stars. There is, therefore, no specification of error to the effect that appellee was, as a matter of law, guilty of contributory negligence, showing that no such contention is intended to be urged.

It is, perhaps, worthy of notice, in passing, that the trial Court, in submitting the alleged contributory negligence of appellee to the jury as a question of fact, carefully protected every legal right to which appellant can possibly claim to have been entitled. In its instructions to the jury the trial Court, after referring to the allegations of appellant's answer to the effect that appellee was guilty of contributory negligence in that he carelessly proceeded from the vestibule, said:

> "In other words, the defendant alleges that this injury that the plaintiff received was due to his own carelessness and negligence, or, in other words, was due to want of due care on his part. And in orderly consideration of this case, it seems to me that this is probably the first question for this jury to determine, because if this injury was due to the carelessness and negligence of Mr. Shellenbarger then he is not entitled to recover, regardless of whether the railway company was negligent or not, and so in an orderly consideration, I would suggest that you consider that question first." (Record, pp. 331-332.)

The trial Court, after stating that appellee had the lawful right to pass from one car to another, further said:

> "But in doing that he was required, as any

> passenger on a railway train is, to exercise due care for his own safety, and to look where he was going, and observe the conditions as he found them, and if he negligently and carelessly fails to do so, and is injured he has no good reason to complain against the railway company." (Record, p. 332.)

Assignment of Errors numbered 3 (Record, pp. 342-343), constituting Specifications of Error numbered 2, 3, 4 and 5 (appellant's brief, pp. 6-7), presents nothing for review by this Court. Said Assignment and Specifications of Error relate to the alleged failure of the trial Court to give four written requested instructions to the jury. As will be shown later and argued at greater length, the Record affirmatively shows that no exceptions were taken by appellant to the alleged failure to give said requested instructions while the jury was still at the bar and prior to the time the jury had retired to deliberate. The failure of appellant to comply with the established rule of this Court, hereinbefore referred to, requiring exceptions to the charge to be taken in the presence of and before the jury retires, precludes, under the decisions of this Court, consideration of said last mentioned assignment and specifications of error.

Assignment of Errors numbered 4, 5 and 6 (Record, p. 344) all relate to the trial Court's permitting certain witnesses, called by appellee, to testify as to the condition in which they found and observed, shortly after the accident, the vestibule and steps of the rear plat-

form of the car where the accident occurred. Said last mentioned assignments of error present nothing for review by this Court because appellant's brief contains no specifications of error with respect to the admission of evidence. It thus appears, as previously stated, that the sole and only question presented for review by this Court is whether there was any evidence of negligence, on the part of appellant, sufficient to warrant the submission of the case to the jury.

APPELLANT'S MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED

In considering whether there was any evidence of negligence on the part of appellant, sufficient to warrant the submission of the case to the jury, it should be borne in mind that the relation of carrier and passenger is such that, although the carrier is not an insurer of the safety of its passengers, it does owe, under the law, an extremely high degree of care. The degree of care owing from a carrier to its passengers has been expressed in a variety of ways by the various Courts.

In *Valentine v. Northern Pac. Ry. Co., 126 Pac. (Wash.) 99,* a case cited in appellant's brief, the Court, after stating that the defendant was operating the train in question as a common carrier, said at page 101: "As such it was incumbent upon it to exercise the highest degree of care, prudence, and foresight, for the safety of its passengers compatible with the prac-

tical performance of the duty of transportation. *It would be liable for the slightest negligence with reference to the exercise of such care.*"

In no case, defining the degree of care which a common carrier is bound to exercise towards its passengers, has the rule of law been any better stated than in the decision of this Court in *Northern Pac. Ry. Co. v. Adams, 116 Fed. 324,* where this Court said at page 330:

> "It has long been established that common carriers of passengers are bound to exercise the utmost degree of care, diligence and skill that is practically consistent with the mode of transportation adopted; and, while they are not required to employ every possible preventive which the highest scientific skill might suggest, the law requires such carriers to use the best precautions in known practical use to secure the safety of their passengers."

It should be borne in mind, also, that a motion for a directed verdict is equivalent to a demurrer to the evidence. As stated by this Court in *Brownlee v. Mutual Ben. Health & Accident Ass'n., 29 Fed. (2d) 71,* at page 76:

> "A motion for a directed verdict, like a motion for a nonsuit, is in the nature of a demurrer to the evidence. In its determination the evidence upon the part of the plaintiff must be accepted as true, and every proper inference or deduction therefrom taken most strongly in favor of the plaintiff.

As said by Mr. Justice Harlan in *Travelers' Ins. Co. v. Randolph (C.C.A.), 78 F. 754, 759:*

> 'The jury should be permitted to return a verdict

> according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction'."

Appellee was not required to prove that appellant was negligent in all of the respects alleged in his complaint. It was sufficient if the negligence of appellant in any one or more of the respects alleged in the complaint was the proximate cause of his injury and appellant's motion for a directed verdict was properly denied, if there was evidence on any ground of negligence, alleged in the complaint, sufficient to warrant the submission of the issue to the jury. Although appellee's proof, in so far as it relates to said motion for a directed verdict, was not required to go to that extent, it is our contention that there was evidence as to every ground of negligence, alleged in the complaint, sufficient to warrant the submission of every issue of negligence to the jury.

(a) The evidence as to the excessive speed of the train was sufficient.

It appeared from the testimony of appellant's own witnesses that the train involved in the accident was, at the time thereof, traveling over a portion of track where, by reason of some construction work in progress, there was in full force and effect a "slow order", promulgated by appellant, itself, limiting the operation of trains to a speed, it "seemed" to the engineer,

of twenty miles per hour, and such of the train crew as testified on the subject, testified, as it might be expected they would, that, in compliance with said "slow order", the train was traveling at the time of the accident at a speed of from eighteen to twenty miles per hour.

On cross-examination of two of appellant's witnesses testimony was elicited strongly tending to show that the train was far exceeding the speed limit imposed by said "slow order", and warranting the jury in finding that the train was running at a rate of speed as great as fifty miles per hour. We refer to the testimony of the witness, Dannell, who was the engineer, and to the testimony of the witness, Challander, who was the fireman. Both testified that as soon as appellee fell from the train signals were given to stop and that such signals meant to the engineer to stop the train at once. Said witnesses further testified that the train was not brought to a stop after the accident and after the receiving of said signals by the engineer until it had traveled a distance of a half a mile.

Such testimony was so inconsistent with and contradictory of their direct testimony that the train was only going at the rate of eighteen or twenty miles per hour, that both of said witnesses were questioned at some length on cross-examination as to the distance it would require to stop a train consisting of the same number of cars and under the precise conditions prevailing, when going at various rates of speed, and said

witnesses testified that such a train as the one in question, if traveling at the rate of fifty miles per hour at the same place, would require a distance of a half a mile to stop, and that the same train at the same place and under the same conditions, going at a rate of speed of eighteen to twenty miles per hour, could be stopped in a distance of five hundred feet or probably less.

The testimony of said witnesses, together with the reasonable inferences and deductions which the jurors, as the triers of fact, were entitled to draw therefrom, was sufficient evidence to carry the case to the jury on the issue of alleged negligent and excessive speed, and tended strongly to show that the train was being operated at the time of the accident at a rate of speed grossly in excess of the speed limitation of appellant's own "slow order".

The conclusion is not only logical but irresistible that if it took the train a half a mile to stop, and a train of the same kind requires such distance, only in the event it is traveling at the rate of fifty miles per hour, and the same train, traveling at the rate of from eighteen to twenty miles per hour, should be stopped in a distance of five hundred feet or less, that the train involved in the accident was going at the rate of fifty miles per hour. Furthermore, the train was not running on any schedule and "didn't have any too much time" to make the siding at Saco and avoid train No. 3 with which it had a "straight-meet". It was for the jury to say, as

a question of fact, whether, under all of the evidence and circumstances surrounding the accident, appellant, which, under the law, owed the very highest degree of care consistent with the practical operation of its train, was negligent with respect to the rate of speed at which the train was being operated.

For the convenience of the Court we have segregated from the Record and print at this point the testimony to which we have just alluded:

Said witness, Dannell, testified, on direct examination, as follows:

"*Q.* . . . . but for that stretch west of Saco there was a slow order in effect at that time?

A. There was, for about two miles west—from Saco west.

Q. Now, do you have a recollection at this time of exactly what the terms of that slow order were?

A. No, I am not positive, but it seems to me it was twenty or twenty-five miles an hour; *it seems to me it was twenty, though.*

Q. For passenger trains?

A. Yes, sir.

Q. Beginning at a point about two miles west of Saco, near the stockyards. You are familiar with that location?

A. Yes, sir." (Record, pp. 223, 224.)

Said witness, Challander, testified, on cross-examination, as follows:

"*Q.* Those two blasts that were given, what would

that mean to an engineer? What would he be supposed to do on receiving those two blasts?

A. To stop.

Q. Would he be supposed to stop just as soon as he could?

A. Well, *the rule says stop at once;* he would use his judgment, I suppose." (Record, p. 251.)

* * * * * * *

"*Q.* Were you aware of the fact that there was a slow order in existence covering two miles west of Saco?

A. Yes, sir.

Q. You knew that that was the order?

A. Yes, sir.

Q. And then at the time these two blasts were given, you were passing through that construction area, weren't you?

A. Yes, sir.

Q. And how fast would you say the train was going at the time the engineer was given these two blasts?

A. Well, at that particular time the engineer had previously reduced the speed of the train on that portion of the track covered by this order, and at that the time that the communication bells were given, *we were possibly going eighteen or twenty miles an hour.*

Q. Eighteen or twenty miles an hour?

A. To my recollection." (Record, p. 251.)

Said witness, Dannell, further testified, on cross-examination, as follows:

"*Q.* Two miles west of the depot then you should

have the train slowed down to twenty or twenty-five miles an hour?

A. Yes, sir.

Q. And then you should continue that two miles at that same speed?

A. Just about that, yes, as near as I could make that speed.

Q. Up to the end of the construction work?

A. Yes, sir.

Q. How fast were you going with the train before you came to that two-mile point?

A. *Oh, I was going pretty—around forty-five or fifty miles an hour.*" (Record, pp. 228, 229.)

* * * * * * *

"*Q.* You think it took you half a mile to make the stop?

A. Yes, sir.

Q. Wouldn't that indicate, Mr. Dannell, you were going at a faster speed than twenty or twenty-five miles an hour?

A. No, sir.

Q. Does it take half a mile to stop a train of ten cars and an engine?

A. No, sir, not if make a heavy stop.

Q. In what distance—

A. It would if going fifty miles an hour, but at twenty miles an hour it wouldn't take no heavy application to use half a mile to stop in." (Record, p. 232.)

* * * * * * *

"*Q.* Now, then, if going twenty to twenty-five miles an hour, what would be the shortest distance you could stop the train in?

A. Well, sir, you can stop awful quick.

Q. About how—

A. At twenty miles speed I should say in—well, I have—I couldn't tell you exactly, *but I imagine a fellow could stop in about five hundred feet.*

Q. About five hundred feet. If a train were going along at about twenty miles an hour, could stop in about five hundred feet, and you have no independent recollection at this time of just how fast the train was going through this construction work, have you?

A. About twenty or twenty-five miles an hour.

Q. But that is just because you had an order to go that fast?

A. Yes, sir.

Q. If you had been a little behind you might have been going faster than that, might you not?

A. No sir.

Q. Do you recall whether you were on time or not?

A. We had no schedule. All we had was a straight-meet with No. 3 at Saco.

Q. Were you sufficiently on time to make this siding to allow the other train to go?

A. Well, we didn't have any too much time, for them to leave on time; but at the same time we could see them coming four or five miles; five miles; and no sight of their headlight, or anything." (Record, p. 233.)

Said witness, Challander, further testified, on cross-examination, as follows:

"*Q.* I will withdraw that question, and I will ask this: Assuming, Mr. Challander, that you have this very identical train in which you were riding as fireman, consisting as I understand it of eleven coaches and an engine, that very train now, and on that very track, that has been testified to here in the testimony, and suppose that when you were on this main line here, at a point a mile and a quarter or such a matter from Saco, two blast signals were given to the engineer, meaning for him to stop the train at once, if that is what it meant, and suppose at that time he was going at eighteen or twenty miles an hour, how long would it take him to bring the train to this stop—what distance?

A. It depends on the application he makes.

Q. How soon could he stop it if he wanted to?

A. That I couldn't tell you; he could stop very suddenly if he wanted to.

Q. In what distance could he stop if supposed to stop at once?

A. Well, sir, those hypothetical questions, I wouldn't care to answer; I haven't seen any figures or tests on that.

Q. Could he stop in five hundred feet?

A. Yes, sir.

Q. Could he stop in less than five hundred feet?

A. Probably." (Record, p. 253.)

In the face of said testimony, we do not feel that appellant is justified in stating at page 14 of its brief: "there was no attempt made to prove the allegations of excessive speed." We can only reconcile said statement on the theory that appellant means thereby that sufficient evidence of excessive speed was not testified to by any witness called by appellee; but it was not necessary that the testimony be so furnished. It has repeatedly been held that upon a motion for a directed verdict, which comes at the conclusion of all of the evidence, the benefit may be taken of favorable evidence, no matter by which side offered or from what witnesses elicited.

It rarely happens that the injured passenger is in a position to produce witnesses on the subject of excessive speed and testimony of that character must, of necessity, in the great majority of cases be obtained from a hostile train crew. Naturally, their self interest as employees of the carrier sued, sometimes renders it difficult to get as much information and data as might otherwise be secured. For these reasons, any admissions by or favorable statements of such witnesses are of the greatest evidentiary value.

That it may constitute negligence to operate a train at an excessive rate of speed is well established. In volume 10 Corpus Juris it is said at page 972:

> "But the rate of speed at which a train or car is run may be dangerous in view of the circumstances or conditions under which it is operated,

> *or because the particular place is such as to require precautions in that respect,* and under such circumstances and conditions may constitute negligence as to passengers thereon, even though it is less than the rate allowed by statute or ordinance; . . . "

(b) The evidence as to an unusual and extraordinarily violent lurch of the train was sufficient.

The second ground of appellant's motion for a directed verdict is that there was no evidence of any excessive or unusual lurch of the train. Under the authorities hereinafter to be noticed, the testimony of appellee, alone, was sufficient to entitle the submission of this issue of fact to the jury, and for the convenience of the Court we print at this point the most pertinent portions of appellee's testimony on this subject:

"*Q.* And just go ahead and tell what happened to you.

A. Well, I started back through the observation car. I was sitting back pretty well to the rear of the car; there were some others there, and we had been talking, and I got up and started; * * * * I went—started back, and I noticed the usual swaying of the train; of course I had to be careful about that; then before I got to the—between the cars—I can't think.

Court. Vestibule? Door?

A. Vestibule. I noticed that there seemed to be more than the usual amount of movement to the train, but I went on. I thought well, it is only momentarily, *and when I got in between the cars, passing through the vesti-*

bule, and went to go to the next coach, why, there was a lurch, a sudden lurch of the train that threw me. I lunged forward. I don't remember whether I struck the train or not, but I didn't have any feeling of striking anything or touching anything, but I just felt myself going, and I wondered where I would strike, wondered what it was like out there. You know how a man will do when he is going through space, and wondering what he is going to strike on. You live a long time there in a few seconds, and that is what I did. That is the last I can remember.

Q. What is the last thing you remember before the accident?

A. I was going through space. Practically that is the only way I can express it." (Record, pp. 97-98.)

* * * * * * *

"*Q.* And now as you passed from the back end of the observation car, making your way forward to the front of that, and from there on to the next platform, you say that there was the ordinary swaying of the train?

A. Yes, sir.

Q. But that didn't—did that throw you down or injure you in any manner?

A. No.

Q. And then when you were passing on to the platform of the rear of this coach, then this other lurch of the car that you are speaking of?

A. Yes.

Q. Now then, just tell the jury, Mr. Shellenbarger, how that lurch that occurred there compared with this swaying that you have been speaking of, that you noticed as you were walking up through the observation car; *was it the same kind of a lurch?*

A. No. Take the ordinary swaying of the car, you can balance yourself as you walk along, but this movement of the car was such that you couldn't protect yourself, that is, it was violent, I would call it,—well, different; was much stronger—well, it wasn't a swaying; it was a kind of a lurch. You lose your—you can't gain your—you can't gain your balance for a short time." (Record, pp. 99-100.)

* * * * * * *

"*Q.* Now was that a lurch which the sudden stopping of the train would make, do you remember?

A. Well, I couldn't say that; that is my impression, that it would be a sudden stop of the train. It might have been—I think the speed was changed,—that is, I have got that impression some way, the speed was changed, and it would indicate to me that it was a stoppage, movement to stop the train." (Record, pp. 109-110.)

In addition to the testimony of appellee, which, in and of itself, was sufficient to carry this issue of fact to the jury, we have the corroborative testimony of the witnesses, Cornell (Record, pp. 39-40-41 and pp. 55-56); Stuart (Record, pp. 67-68 and pp. 73-74); and J. O. Freck (Record, pp. 148, 149).

There is the further corroborative testimony of the witnesses, Mrs. Georgia H. Cheney and Mrs. J. O. Freck, the most material portions of whose testimony on the subject of the jerking and lurching of the train follows:

Mrs. Cheney, who was riding in the rear part of the very coach from which appellee was thrown, testified:

"*Q.* State whether or not, Mrs. Cheney, anything unusual occurred with respect to the operation of the train, immediately prior to your going back there and observing this condition of this vestibule door; whether anything happened out of the ordinary?

* * * * * * *

A. There was a decided jerk to the train.

Court. What?

A. A decided jerk of the train, enough to throw me against the card table.

* * * * * * *

Q. And state whether or not that decided jerk that you spoke of, was that just an ordinary swaying motion of the train?

A. It was not.

Q. And how violent a jerk was it? Just tell the jury as clearly as you can, so they will appreciate the severity of it.

A. It was forcible enough to throw me against the card table; had not the table been there, I think I should have fallen on the floor." (Record, pp. 61-62.)

Mrs. Freck, who was riding in the same coach as Mrs. Cheney, testified:

"*Q.* And now then, I wish you would state to the jury whether or not prior to this announcement being made that a Sir Knight had fallen from the train—state whether or not there was anything unusual that you observed in the movement of the train.

A. Just a few seconds before the announcement was made there was a very sudden, and I would say rather violent lurch. I was sitting with my back to the engine, and in attempting to describe the lurch, it would throw me backward like this, and the party in front of me was suddenly pushed forward against the table; we had a card table between us.

* * * * * * *

Q. What effect, if any, did this sudden lurch of the train have upon Mrs. Cheney, and have upon yourself?

* * * * * * *

A. Well, she was rather disturbed.

Q. And you were all seated at the table at the time this occurred?

A. Yes, sir.

Q. Now, in what way was she disturbed? That is rather a general term. These gentlemen here they want to know what sort of lurch of the train it was, if there was one. How much did it disturb her?

A. She was thrown forward this way against the edge of the table, and I would say that she was made rather

uncomfortable from feeling the edge of the table against her abdomen, ...

Q. What would you say, Mrs. Freck, as to whether or not this lurch of the train which you have described—state whether or not that was just an ordinary lurch or swaying of the train that might ordinarily occur in the ordinary operation of it, or whether it was an extraordinary and more violent jerk?

A. Well, I would say it would be in the nature of a jerk or lurch similar to when you are riding in a car and you are stopped suddenly, or attempt to stop suddenly.

Q. Mrs. Freck, just answer my question if you can, as to whether or not it was just the ordinary swaying of the train, or an extraordinary lurching of it?

A. It was not the ordinary swaying of the train, it was a lurch forward." (Record, pp. 80-82.)

Notwithstanding the evidence just quoted, counsel for appellant have no hesitation in stating at page 23 of appellant's brief: "In the case at bar the record shows no interruption to the operation of the train at the time of plaintiff's accident. No other passenger is shown to have been affected in any way by the sudden movement complained of." It is also argued that the lurching and jerking of the train, described by appellee and the witnesses corroborating him, must have been a lurching or jerking incident to stopping the train after appellee fell. This suggestion comes with poor grace from appellant as none of the train crew or

other witnesses produced by it testified to the existence, *at any time,* of any lurch or jerk of the train. The contention of appellant throughout the trial was that at no time did anything unusual or extraordinary occur with respect to the operation and movement of the train.

An amusing sidelight with respect to the lurching of trains was afforded by the statements of two of appellant's witnesses. The forward brakeman, McCloud testified (Record, p. 261) that, although he had been railroading twenty-five years, he had *never* ridden on a train that he could say was roughly handled. In striking contrast to his testimony was that of the passenger conductor, Spooner, who testified as follows:

"*Q.* Do trains lurch at times?

A. They do sometimes; yes.

Q. And your experience during that twenty-five years—you have known lots of lurches on trains, haven't you?

A. Certainly have.

Q. And you have known lurches violent enough to throw somebody walking through the train, haven't you?

A. Yes, sir.

Q. For instance, people would be thrown while walking from one vestibule to another, that has happened?

A. Yes, sir.

Q. That would be what you boys call rough handling of the train?

A. Yes, sir." (Record, p. 289.)

Appellee had walked through the vestibules of the train many times during the two days intervening before the accident occurred and he had no difficulty and he did not experience such a jerk or lurch as occurred at the time he was thrown. His testimony and that of the witnesses corroborating him shows that the movement of the train at the time of the accident was not such a jerk or jar as is ordinarily incident to the operation of railway trains. The law relating to the liability of carriers for injuries to passengers resulting from the lurching of trains is thus concisely stated in volume *10 Corpus Juris, at pages 973-4:*

> "It may constitute negligence that the train or car is so operated that, by jerking or jarring, passengers are imperiled who are properly conducting themselves with reference to their transportation, even though they may be standing or moving for the purpose of getting off the conveyance . . . . Thus it may constitute negligence to stop a train or car with such suddenness and violence as to cause injury to a passenger. But in order that the above rule may apply the jerk or jar must be unnecessary or unusually sudden or violent; such jerks and jars as are necessarily incident to the use of the conveyance, and are not the result of negligence, will not render the carrier liable for resulting injuries" . . . .

That the trial Court, in instructing the jury, adhered strictly to the rule of law stated in said text is shown by the following portion of its charge:

> "Now, of course the movement of passenger

> trains in the manner required by modern demands is such that some swaying and jarring and lurching of the train is unavoidable, and the railroad company is not responsible for an injury to passengers that may result from such usual swaying and lurching, but it is responsible for injury to a passenger from unnecessary and violent operation of the train." (Record, p. 334.)

The weight of judicial authority is to the effect that testimony showing an unusual and extraordinarily violent lurching or jerking of a train constitutes a *prima facie* case of negligent operation on the part of the carrier, sufficient to carry the issue of negligence to the jury. The decision of this Court in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294*, a more extended reference to which is elsewhere made in this brief, is sufficient authority for the proposition of law just stated. In that case the plaintiff testified that the sudden stopping and jerking of the train caused her to be thrown to the floor of the car and this Court properly held that such testimony rendered the doctrine or maxim *res ipsa loquitur* applicable and was sufficient to warrant the submission of the issue of negligent operation of the train to the jury.

In *Kentucky & T. Ry. Co. v. Ball, 194 S.W. (Ky.) 785*, plaintiff, a passenger on a *mixed* train, testified that the train came to a sudden and violent stop, throwing her against the arm of the seat. She described the stop as unusual, unnecessary, quick and sudden. Defendant's evidence was that no sudden or violent stop was

made and that nothing unusual occurred. A judgment for plaintiff was reversed because it was held that a certain instruction to the jury incorrectly stated the law with reference to the degree of care owed by a carrier operating a mixed as distinguished from an exclusively passenger train. The Court held, however, that the evidence was sufficient to take the case to jury and that the trial Court had no right to direct a verdict for defendant.

On this phase of the case the Court said, at page 787:

> " . . . . the injured passenger may rest his case when he shows a sudden stop and resulting injury, although he may not be able to explain how or what caused it. The company operating the train is presumed to know why a stop of this sort was made, and if it wishes to excuse itself on the ground that it was necessary or unavoidable in the prudent operation of such a train, it must produce evidence in support of this defense. In this case, however, the defense of the company was that no stop was made that could reasonably be calculated to produce the injury of which Mrs. Ball complains, and of course the company had a right to confine itself to this defense. . . . *We are of the opinion that the evidence of Mrs. Ball, although unsupported, was sufficient to take the case to the jury.*"

In Goldstein v. United Railroads of San Francisco, 202 Pac. (Cal.) 155, the complaint alleged that the motorman turned on the electric current suddenly and with great force, causing the car "to start or bound

forward with great speed". In affirming a judgment for plaintiff the Court said at page 156:

> "Appellant urges . . . that the evidence relating to the circumstances of the accident consisted of mere expressions of conclusions of witnesses that the jerk was unusual and violent. This criticism is not merited. The witnesses testified to physical facts."

The testimony of appellee, showing very vividly what happened to him as he was undertaking to pass from one car to another, cannot rightfully be said to be a mere expression of opinion or conclusion. It was most certainly testimony as to physical facts.

In *Renfro v. Fresno City Ry. Co., 84 Pac. (Cal.) 357*, cited by this Court with approval in said case of *Southern Pacific Co. v. Hanlon*, the following language appears at page 359:

> "Ordinarily a passenger injured while riding on a car is not in position to know more than that by some unusual movement of, or happening to, the car he has received injury. What caused the movement or happening he cannot be expected to know, and it is for this reason and for the further reason that the persons operating the car should know the cause and be able to explain it that the presumption of negligence arises, and that the burden is cast upon the railroad company to explain the cause. The present case fairly illustrates the wisdom and justice of the rule. The proximate cause of plaintiff's injury was the sudden jerking of the car forward when he had reason to believe that it was about to stop. Beyond this he was in no position to know the cause. If such sudden movements of street cars, under like circumstances, are

necessary or unavoidable, in their operation, we think the rule would cast the burden upon the company operating the cars to show this fact as part of its defense."

In *Scott v. Bergen County Traction Co., 43 Atl. (N. J.) 1060,* plaintiff testified that while she was standing on the rear platform of the car, intending to alight when it stopped, the car gave a sudden lurch forward, throwing her to the ground. In affirming a judgment for plaintiff the Court held that the circumstances related by plaintiff, if true, justified an inference of breach of duty on the part of the carrier within the maxim *res ipsa loquitur* and required the submission of defendant's alleged negligence to the jury. It was contended that plaintiff was guilty of contributory negligence, as a matter of law, in failing to take hold of a hand rail, but the Court held that "what the plaintiff was bound to do, under all the circumstances, in the exercise of ordinary care, was a question for the jury." To the same effect is *Consolidated Traction Co. v. Thalheimer, 37 Atl. (N. J.) 132,* where the only evidence of negligence was plaintiff's testimony that the car gave a "lurch" or "jerk" of sufficient force "to throw her right off."

In *Auld v. Southern Ry. Co., 71 S. E. (Ga.) 426,* plaintiff's intestate was seen to go to the rear door of a coach which was not vestibuled and to pass through the door on to the platform. As she left the door there was a sudden plunge or jerk of the train which re-

quired the other passengers to hold on to their car seats. The deceased was found lying on the right of way, having apparently been precipitated from the train by the lurch thereof. In reversing a judgment of non-suit, the Court said at page 427:

> "The circumstances attending the injury . . . were sufficient to make a *prima facie* case against the carrier, and the burden was upon it to overcome the imputation of negligence or to show the passenger's contributory negligence. . . . These facts are not conclusive that Mrs. Auld was thrown or fell from the train by a jerk usual and incident to the ordinary operation of the train. Under the rule just stated, it was a question for the jury to determine whether the defendant was negligent in the operation of the train, and whether under all the circumstances plaintiff's intestate was guilty of such negligence in undertaking to pass from one coach to another as would defeat a recovery."

In *Babcock v. Los Angeles Traction Co., 60 Pac. (Cal.) 780,* also cited approvingly by this Court in said case of *Southern Pacific Co. v. Hanlon,* plaintiff testified that he was thrown from the car by the lurching thereof at a curve. It was there stated at pages 781-2:

> "The Court properly denied the motion for a non-suit. That the evidence given on behalf of the plaintiff tended to establish negligence on the part of the defendant is not open to dispute, and it was for the jury to determine whether it was sufficient for that purpose. When the plaintiff showed that the defendant had assumed to carry him as a passenger upon one of its cars, and that while being so carried he had sustained an injury *by*

reason of the manner in which the car was propelled along the track, a *prima facie* case of negligence was established, which in the absence of any other evidence entitled him to a recovery. In *McCurrie v. Southern Pacific Co., 122 Cal. 558*, we said:

'A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part'."

In *Richardson v. Portland Trackless Car Co., 113 Ore. 544*, plaintiff testified that while he was standing in the aisle between the seats of the bus, "all at once there was a terrible lurch of some kind, as though it struck a low place or something like that, and I saw the door fly open and out I went, and I suppose that is the last I knew." With reference to the sufficiency of this evidence the Court, speaking through Mr. Justice Belt, said at pages 547-8:

"This evidence, in our opinion, constituted a *prima facie* case of negligence, and therefore *no*

> *error was committed in denying the motion for nonsuit and directed verdict.* The defendant company as a common carrier was obliged to exercise the highest degree of care consistent with the practical operation of its bus in carrying plaintiff safely to his destination. While the defendant is not an insurer against injury, and the mere happening of an accident does not of itself imply negligence, nevertheless it may be inferred by reason of the relation existing between the parties and the manner in which the accident happened. *Assuming, as we must do, that the testimony of the plaintiff is true,* this is a case of *res ipsa loquitur.*"

The further language of said Court, to be found at page 548, is singularly pertinent:

> "Can it be said when a passenger by reason of an unusual lurch is thrown against the door of the bus and out into the street it is an accident that might happen in the ordinary course of things? We think not. In view of the status of the parties hereto as carrier and passenger and the manner in which this accident occurred, we are of opinion that a jury might well draw the reasonable inference that it happened as a result of the negligence of defendant."

The citing of further authorities would be superfluous and an imposition on this Court. It is manifest that the trial Court did not err in refusing to direct a verdict for appellant on the alleged ground that the evidence, relating to an excessive or unusual lurch of the train, was insufficient.

(c) **The evidence of negligence with respect to the condition of the vestibule—as to opening—was sufficient.**

The next ground of appellant's motion for a directed verdict is that the evidence failed to show that it was negligent in any particular alleged with respect to the condition of the vestibule of the car as to lights, opening, or the method of safeguarding the vestibule, (Record, p. 342). For convenience, we will consider first the evidence and law relating to the open vestibule door and steps and will next consider, combining the two matters under one heading, the evidence and law relating to lights and the method of safeguarding the vestibule.

In the complaint, as amended, (Record, pp. 5-6), it is alleged that appellant negligently suffered and permitted the train to be in an unsafe condition and dangerous to passengers, who might be in the act of passing from one car to another, in that the vestibule door and steps, on the car from which appellee was thrown, were allowed to be and remain open and exposed between stations, at a time when the train was still in rapid motion, and in that said vestibule door and steps were so open and exposed at an improper and unsafe place in the train.

In its answer, (Record, pp. 11-12), appellant denied that said steps were open but expressly admitted that said vestibule door was open, at the time appellee was injured, and, with reference to said open vestibule door,

appellant, by way of an affirmative answer and defense, alleged, in substance, that an employee of appellant, whom the evidence shows to have been the rear brakeman or rear flagman, had, in the regular discharge of his duties in connection with the operation of the train and in the exercise of due care for the safety of the train and the passengers thereof, opened said vestibule door.

Said affirmative allegations of appellant's answer were denied by appellee's reply (Record, p. 13), so that with respect to said steps there was an issue as to whether they were open or not and with respect to said vestibule door there was an issue, which was limited, under appellant's admission, to the question of whether allowing said vestibule door to be so open constituted negligence.

The vestibule door referred to was, when considered with relation to the direction the train was traveling, the lefthand vestibule door of the rear platform of the coach immediately ahead of the observation car—the latter being the last car in the train. The steps referred to were the steps located on said lefthand side of said rear platform of said coach. The testimony showed that when the "trap" covering said steps was raised it left said steps open so they could be used to stand on or for the purpose of descending from or boarding the rear platform of said coach and that when said "trap" was closed it covered said steps and became a part of the surface of said rear platform.

At the time of the accident, which occurred at about ten thirty o'clock at night, appellee, who had been in said observation car and was intending to go to his berth for the purpose of retiring, was undertaking to pass from said observation car into the said coach next ahead and it was through said open vestibule door that appellee was thrown, as he contends, by a sudden and unusually violent lurch of the train, or, as appellant contends, appellee walked.

Appellee contended, among other things, that said vestibule door and steps should not have been open at a time when the train was not stopped to discharge or receive passengers but was in rapid motion and that said rear brakeman or flagman should have performed whatever work he was undertaking to perform for appellant at the time at the rear end of said observation car, a place where there would be no passengers passing back and forth, and that the opening of said vestibule door was in violation of a standard operating rule of appellant, and that said vestibule door was opened wider and sooner than was necessary and that said vestibule door was unnecessarily left open for a longer period of time than any operating necessity demanded. Appellant contended, as alleged in its answer, that said vestibule door was necessarily open at the time appellee was injured to enable said rear brakeman to carry on his work.

As disclosed by the Record, the train was to take a siding at or near the town of Saco, Montana, in order

that a westbound limited train, which had the right of way over it, might pass. It was the duty of said rear brakeman, so he testified, after the train had pulled completely into said siding and cleared the main track and stopped, to get off and close the side track switch and then re-board the train, and said rear brakeman testified that it was also his duty to be on the lookout for the purpose of protecting the *rear end* of the train against any oncoming train. The Record shows that at the time appellee was injured the train was in rapid motion. It was neither discharging nor receiving passengers, and there was no occasion for any such purpose to have said vestibule door or steps open, and the issue was squarely presented, as above outlined, as to whether said vestibule door or steps necessarily had to be open for the practical operation of the train.

The trial Court held that said issue was an issue of *fact* to be determined by the jury under the guidance of the Court as to the principles of law applicable to the case. In other words, the trial Court refused to say, as a matter of law, that it was negligence to have said vestibule door and steps open and refused to say that it was not negligence and of this appellant complains. The determination of such issues, not being a matter of law but a matter to be decided according to the attending facts, the trial Court properly left the determination thereof to the jury.

So, this Court will find that in the charge to the jury the trial Court, without alluding particularly to said

steps, said: "The vestibule door, therefore, should not be open, but should be kept closed while the train is in motion, unless it is impossible to do so in the practical operation of the train, and it is a question of fact in this case whether or not the opening of this vestibule door by the brakeman was necessary in the practical operation of the train. If it was, then it was not negligence to open it; if it was not, then it was, and if the opening of the door was the proximate cause of the injury to plaintiff, then he would be entitled to recover." (Record, p. 334.) Under the authorities later to be referred to, the leaving of said matter, in this fair manner, to the jury, was all that appellant can reasonably ask.

It appeared that said vestibule door was not only open but that it was opened completely and latched back to the body of the coach (Record, p. 278). For the convenience of the Court we will at this point print the important portions of the testimony relating to said open vestibule door and the non-necessity, as appellee contends, of its being open and will follow it with the important portions of the testimony relating to said steps or "trap" being open. We believe said testimony will not only show the earnestness and sincerity with which the jurors performed their function of trying to get at the true facts, but will satisfy this Court that, bearing in mind the extremely high degree of care owing from a carrier to its passengers, there was no operating necessity for said vestibule door or

steps being open, and that the jury was well warranted in finding against appellant on said issues of fact, so submitted by the trial Court.

The witness, Brown, who was said rear brakeman or rear flagman, testified as follows:

"*Q.* You could have had this door in the same position shown in this photograph here, this Defendant's Exhibit "I", and have stood there in this opening between this side of the door and the back of the vestibule, couldn't you?

A. Yes, sir.

Q. And then looked from that point ahead along the train, and towards the engine, to make whatever observation you wished?

A. I could have, but it would have been kind of a dangerous position.

Q. Would have been dangerous to you?

A. Yes, for me.

Q. Would not have been dangerous for the passengers, though?

A. I presume not; not as dangerous, at any rate." (Record, p. 297.)

* * * * * * *

"*Q.* So that for a minute of time then, while the train was in motion, the left hand vestibule door at the rear coach ahead of the observation car, was open?

A. Yes, sir.

Q. And fastened back to the body of the car?

A. Yes, sir." (Record, p. 299.)

* * * * * * *

"*Q.* . . . . So if you had wanted to you could have gotten off this train at this time at the rear of the observation car, and closed your switch and gotten on at the rear end, couldn't you?

A. Yes, sir.

Q. And in doing that you could, if you had wanted to, either opened up the back of the observation car, or have jumped over the rail, as you finally did?

A. Yes, sir." (Record, pp. 301, 302.)

* * * * * * *

"*Q.* So you could have, if you wanted to, gone back to the rear of the observation car, and without opening the door, have looked along the track?

A. Yes, sir.

Q. And if you had wanted to get off you could have opened the door?

A. Yes, sir.

Q. And gotten down there?

A. Yes, sir." (Record, p. 302.)

* * * * * * *

"*Q.* I will ask you if the printed regulation isn't that you should occupy at the night time always the rear end of the train?

A. During the night—

Q. At night time I mean.

A. During the night hours—

Mr. Rockwood: Just a moment; the rule is the best evidence, and is already in evidence. I have no objection to asking if that is the rule.

A. Yes, sir." (Record, p. 303.)

* * * * * * *

"*Juror:* How far from the switch, west of the switch, was it when you opened the door?

A. Right at a mile.

Juror: Where?

A. Right at one mile west.

Juror: Why did you open at that distance from the switch? What is your custom? Your opening of the door, as I understand it, is to get off when the train has got into the siding, close the switch, and then walk around the back end and signal to the engineer to go ahead. Isn't it?

A. There is no specified distance where we shall open the doors, but we have a rule that compels us to get off on the opposite side of the track from the switch.

Juror: I was wondering why you opened it so far away from the switch, when there was no necessity of opening it until you got to the switch?

A. Well, we had a slow order, and it was to observe the movement of the train, and the general conditions.

Juror: You say it was about a mile back from the switch?

A. About a mile; yes.

Juror: They had not stopped for the switch, of course.

A. Oh, no, no." (Record, p. 317.)

* * * * * * *

"*Court:* Then there was no necessity of your dropping off the train until it passed in on the siding?

A. Until I came to the switch; but it was my duty

to see where I could—be at my position of duty so I could drop off when the time came.

Court: The train stops before it enters the switch?

A. Yes, sir.

Court: After the front brakeman has opened the switch?

A. Yes, sir." (Record, pp. 318, 319.)

* * * * * * *

"*Juror:* No occasion for you to get off the train until it gets into the siding and you get off at the switch and close the switch on the opposite side from the engineer?

A. Not necessarily opposite from the engineer; but I get off by the switch as the train pulls by, on the opposite side of the track from the switch.

Juror: But you don't get off until the rear coach, which you are supposed to have been in—you don't get off until that has either reached the switch or passed through it?

A. Until it reaches it; yes, sir.

Juror: As I understand, you opened this door a mile or more prior to that; and I can't understand why you did that, as long as it wasn't necessary, and the train moving at that rate of speed.

A. We don't consider twenty miles an hour very fast speed, if we were going twenty, and the train was slowing down, and I was in position in case we stopped there. You never know on a slow order when you are going to stop, and I was in position, if necessity required it, to drop off." (Record, p. 319.)

* * * * * * *

"*Juror:* Wouldn't it, as a matter of fact, been soon enough to open that door when the train stopped, when the front end of the train got to the switch and stopped to open the switch, wouldn't that be soon enough to open the door?

A. Well, close to the switch, yes, sir.

Juror: Because you had the full length of the train to go in before you needed to get off.

A. Yes; but we are supposed to be at our position of duty, where we can perform our duty at any time; between the stations, or any place.

Juror: You could have been just inside the door, and when the train stopped you would know stopped to open the switch, and then open the door, and as the train was coming back and coming to that switch, you would have had plenty of time to open the door and get off?

A. Yes, sir.

Juror: Your duty is to close the switch?

A. Yes, sir, that is one of them.

Juror: Now, could you perform it any better by getting the door open a mile back, than you could to open the door at the time your train got on the siding? Or, to put it another way, as Mr. Ross asked you, when the engine comes to the switch and the front brakeman, the head brakeman, opens the switch, if you got off then would you leave the door open and then walk the entire length of the train in order to perform that duty of closing the switch after the train

got on the siding; or really, was there any necessity, then, of your opening the door until the train did get on the siding?

A. Well, as it turned out, no. But when the train slowed down I wasn't figuring on the switch then, because I knew we wasn't to it by a mile; but I was figuring on protecting the train as flagman." (Record, pp. 321, 322.)

With reference to the violation by said rear brakeman of said standard operating rule of appellant in not being stationed, at the time of appellee's injury, at the rear end of said observation car and in not performing his flagging or other duties from that place in the train, important testimony was elicited from appellant's witnesses. The witness, Challander, who was the fireman, testified, on that subject, as follows:

"*Q.* I will ask you then to refer to this Great Northern book, Mr. Challander, and read that Section 836 there. You need not read it out loud, just read that over to yourself, then I may compare them.

A. You want me to read this to the jury, sir.

Q. No, no, just read it over to yourself, and satisfy yourself that was the rule. I will ask you to read that, and state whether or not that rule there was in effect on the 13th of July, 1928, at the time this accident occurred?

Mr. Rockwood: I will stipulate it was.

A. This book was in operation—this date in this book shows it was in 1921.

Mr. Rockwood: That book of rules was still effective.

A. This was still effective in 1928.

Mr. Dibble: We will offer that rule in evidence.

Mr. Rockwood: I have no objection to it being read, but I do not want the book out of my possession.

Mr. Dibble: "The proper position for the rear passenger brakeman, while his train is in motion, is in the last car of the train, regardless of whether it is an observation, sleeping or private car, but during daylight hours he should get off the head end of such car. At night he must ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes." (Record, pp. 248, 249.)

The witness, Spooner, who was the conductor, testified, on the same subject, as follows:

"*Q.* Now, then, Mr. Spooner, this train was governed, as far as the movements of the rear brakeman were concerned by this rule I have read here, Rule 836?

A. Yes, sir.

Q. That is the standard rule governing the operation of trains?

A. Yes, sir." (Record, p. 265.)

* * * * * * *

"*Q.* And this accident occurred around about what time of the night? Somewhere around about ten thirty, wasn't it?

A. About ten thirty, yes.

Q. And the rule there would be—wasn't this rule in effect here: "At night,"—referring to the rear brake-

man—"he must ride in the rear end of the car, and must have near at hand necessary flags, lanterns, fuses and torpedoes." This was in effect at the time?

A. Yes, sir." (Record, p. 267.)

Upon the issue as to whether said steps or "trap" were open there was, in addition to the direct testimony presently to be quoted, the inferences to be drawn from the testimony of appellee. In passing from the observation car to the coach ahead he would naturally walk along the surface of the platform between the steps on either side. In his description of what took place appellee stated that when the sudden and violent lurch of the train occurred he completely lost his balance and felt himself passing through space. It is a fair inference from his testimony that the steps were open. Otherwise, he would not unlikely have struck against and been stopped by the body of the coach. The steps being open, he dropped clear through the vestibule and out on to the right-of-way.

The proof that the steps or trap were open at the time appellee was injured does not depend upon the reasonable inferences deducible from his testimony. There was direct testimony to that effect given by the witnesses, Mrs. J. O. Freck and her husband and by appellant's witness, Brown, the rear brakeman.

Mr. and Mrs. J. O. Freck were seated at a card table near the rear platform of the coach from which appellee fell and as soon as announcement was made that an

accident had happened they hurried to the door and observed the condition in which said rear platform and vestibule then was. They found the lefthand rear vestibule door open and the steps or "trap" on the lefthand side open as well and both so testified.

On this subject, Mrs. Freck testified, in part, as follows:

"*Q.* What was the first notice you had that there had been an accident?

A. . . . . Some party stepped to the door . . . . and said 'We have lost a Sir Knight'." (Record, p. 77.)

* * * * * * *

"*Q.* Now will you state . . . . what, if anything, you did immediately thereafter, after that was said?

A. Well, the men folks immediately rushed, and we women folks as fast as we could follow.

Q. And how soon did you rush out yourself after this announcement had been made?

A. Right immediately." (Record, p. 78.)

* * * * * * *

"*Q.* Now, when you went back there, which you say was immediately after this announcement that a Sir Knight had fallen from the train, the train was still in motion and was not yet at Saco, what condition did you find the vestibule of that coach to be in?

A. When we rushed out into this vestibule the men folks were first, and I was right after them, *and the trap was open, and the door was open.*

Q. And on which side? On which side of the vesti-

bule was the opening with respect to the direction the train was going?

A. Well, as far as my sense of direction is concerned, I think it was on the left side." (Record, pp. 79, 80.)

Mr. Freck testified on this same subject, in part, as follows:

"*Q.* What was the first notice you had that there had been an accident?

A. Well, we were—Mr. and Mrs. Cheney and Mrs. Freck and myself were sitting in the last compartment on the car, that is the end next to the vestibule of the observation car, playing bridge, and the first notice that we had of any accident or anything, some one stuck their head in our door and hollered that one of the Sir Knights had fallen off the train.

Q. And after that occurred, state whether or not you got up and went to see what had happened?

A. Yes, sir.

* * * * * * *

Q. What did you do after that announcement was made?

A. Mr. Cheney and I jumped up and rushed outside, out to the vestibule.

Q. State when that was with reference to the time that they said the Sir Knight had fallen off the train; how long after that announcement was made did you get off it?

A. I don't understand the question.

Court: How long after you were told someone had

fallen off the train was it that you went to the vestibule?

A. *Immediately.*

Q. And state what condition the train was when you went back there, as to being in motion or not.

A. We didn't go back; we were right there at the vestibule. The door of our compartment was right at the door of the car and in other words, it was next to the platform of the train—of the vestibule of the train where the Sir Knight fell off the train.

Q. When you went back there state whether or not the train was in motion.

A. The train was in motion when we jumped out, yes. When this Sir Knight hollered in the drawing-room to us the train was in motion, yes.

Q. Had it stopped yet after the accident? Had it got to Saco?

A. No, sir.

* * * * * * *

Q. *What was the condition of the vestibule when you went back there, as to being open or otherwise?*

A. *The door to the vestibule was standing open from where—we went out on the vestibule, and the vestibule door and trap was open when we got out there, Mr. Cheney and I.*

Court: On which side of the train?

A. It was on the north side of the train, sir.

Q. Which side would that be, left or right, as you

would come from the observation car and be going towards the engine?

A. On the left." (Record, pp. 146-148.)

Upon the trial appellant's counsel objected to the testimony of said last mentioned witnesses on the ground that it did not appear that their testimony related to the condition of the vestibule door and "trap" at the *precise* time appellee fell. The Court held, however, and properly, that their observance of conditions occurred at a time so soon after the accident as to render said testimony admissable and that appellant's objection went to the *weight* rather than to the *relevancy* of the evidence. Although the admission of said testimony is included in the Assignment of Errors and it was stressed upon the argument of appellant's motion for a new trial that error was committed in receiving said testimony, appellant has abandoned its former contention in that regard and acquiesced in the trial Court's ruling, for there is not included in appellant's brief any Specifications of Error relating to the admission of evidence. As hereinbefore stated, this Court has held that assignments of error, which are not included in the specifications of error to be relied on and urged, are considered waived and abandoned.

In justice to the trial Court and in support of the ruling made, we call this Court's attention to the following authorities: *Jones v. City of Seattle et al 98 Pac. (Wash.) at p. 744; Johnson v. City of Sioux City 86 N.W.*

(Iowa) at p. 213; Gulf etc. Ry. Co. v. Fowler 122 S.W. (Tex.) at p. 596; Meyers v. Highland Boy Gold Min. Co. 77 Pac. (Utah) 350; Missouri etc. Ry. Co. v. Oslin 63 S.W. (Tex.) at pp. 1042-3; Texas Midland R. R. Co. v. Brown 58 S.W. (Tex.) at p. 45; and *Enc. of U. S. Sup. Ct. Reports, volume 5,* wherein it is said at page 1013:

> "It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which refer to its sufficiency or effect; they arise in different stages of the trial; and cannot, with strict propriety, be propounded at the same time. Accordingly, it is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. *It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the nonexistence of the disputed fact.* The reason for this is that relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. *And in this regard the trial Court may exercise a wide discretion which a Court of errors will not interfere with.*"

It is urged in appellant's brief that the testimony of Mr. and Mrs. Freck is of no evidentiary value but to our minds it was the strongest kind of evidence that the steps or "trap" were open when appellee fell through. The only trainman or other person on said rear platform at the time were appellee and the rear brakeman. The conductor and forward brakeman were in the baggage car and neither they nor any other

trainman testified to opening the steps or "trap" at any time after the accident. As soon as the accident happened said rear brakeman ran back through the observation car, excitedly announcing that appellee had fallen. He did not say that he opened the "trap" after the accident.

The open condition of the vestibule door and steps —both on the same side, the lefthand—which said witnesses found, immediately after the accident, must have been the condition in which they were left by said rear brakeman. It is rather subtly hinted in appellant's brief that some passenger may have opened the "trap". Any such argument is most unreasonable. No passenger was shown to have done so and it is common knowledge that passengers do not do such things.

Appellant expended some effort on the trial, directed to showing the simplicity of the trap and the ease with which it could be lifted and fastened. What may be known by a trainman, familiar with appliances daily used by him, is not known by the average passenger and the ordinary passenger knows better than to tamper with railway equipment. Of one thing we may be morally certain, no passenger at the hour of ten thirty at night opened the steps of the rapidly moving train.

We conclude our reference to the testimony, showing that said steps or "trap" were open, at the time appellee was injured, with a quotation from the testi-

mony given by said rear brakeman, himself. Although one would naturally assume that instead of standing on the platform, several feet above the road bed, he would have had the steps open and being standing on one of them and leaning out, preparatory to alighting to close the switch, he testified, in answer to questions by counsel, that he had the "trap" closed and was standing on it. Late in the trial, however, and at an unguarded moment, while he was being closely interrogated by one of the jurors, rather than the attorneys, he forgot his story and "let the cat out of the bag", so to speak, and testified as follows:

"*Juror:* You opened the door about a mile back?

A. Yes, sir.

Juror: Of where it was necessary to have it open so you could get out of the car and perform your duties?

A. Opening that trap put me in position to perform my duty in case the train stopped before we got to the switch. My duties require me to go back and protect the rear of the train; as soon as it is stopped, proceed back with the proper equipment to stop any following train." (Record, pp. 320, 321.)

From all of the testimony heretofore printed in this brief, relating to said open vestibule door and said open steps or "trap", the jury was well warranted in finding any one or more or all of the following to be true:

First: That said vestibule door need not have been completely opened and latched back. For the purpose

of seeing when it was necessary for him to alight and close the switch, the rear brakeman could just as well have held the door only partly open, and had he done so his body and the door partly closed would have prevented any passenger having occasion to pass that way from falling or being thrown from the train. So far as the flagging part of said rear brakeman's duties was concerned, the evidence of appellant's own witnesses was that under said standard operating rule the rear brakeman was not where he belonged. It being *night time* he should have been at the *rear end* of the observation car, protecting the *rear end* of the train from oncoming trains.

Second: That said vestibule door and steps were open for an unreasonable and unnecessary length of time. There was no operating necessity requiring the opening of said vestibule door or "trap" a mile ahead of the place where said rear brakeman was to alight. Said vestibule door need not have been open for a whole minute—as he testified it was—prior to the time he would have occasion to alight. During such an interval many passengers might be passing back and forth between the cars. So far as the switch-closing was concerned, said vestibule door and "trap" could well have been kept closed until the engine arrived at the entrance to the switch. The train would there stop because it could not go into the siding until the switch was opened. Then, would have been amply soon enough to open the vestibule door and steps. Their

opening could even have been longer deferred as said rear brakeman was not required to get off and close the switch until the entire train had cleared the main track and taken the siding.

Third: That the rear brakeman could have done everything that he testified he was required to do, with equal or to better advantage had he been on the rear platform of the observation car. He testified, page 302, Record, that the railing on the lefthand side of the rear end of the observation car could be opened and had a "trap" and steps leading to the ground. The two platforms were of the same standard height. He could have looked around the rear end of the observation car and seen ahead just as far and well as he could from the rear end of the next coach. From the standpoint of safety to himself the rear platform of the observation car was the better place. The railing enclosing it would have served as a protection, enabling him to lean far out, without danger of falling. Had he been on the rear platform of the observation car, where under the standard operating rule of appellant he belonged, it would, most certainly, have been safer for the passengers and, in view of the extremely high degree of care owing from a carrier to its passengers, the safety of the passenger should be and is the first consideration.

Fourth: That in undertaking to perform the flagging part of his duties—the protecting of the rear end of the train, while it was passing through the area of track

where construction work was in progress—at the rear platform of the coach ahead of the observation car, said rear brakeman was acting in defiance of Section 836 of the standard operating rules of his employer. Said rule is shown in its entirety at page 249, Record, and as appellant's counsel insisted "speaks for itself". Said rule expressly and specifically provides that whether the last car of the train be "an *observation*, sleeping or private car" the rear brakeman *must* at night "ride in the rear end of the rear car and must have near at hand the necessary flags, lanterns, fuses and torpedoes". He was not there and, instead, opened the vestibule and "trap" of the car ahead of the observation car. If he could properly do this, then it follows that, with equal propriety, he could have opened the vestibule and "trap" of any other car on the train and, with immunity to appellant, endangered the life and limb of its passengers.

Many splendid decisions have been rendered with reference to the liability of passenger carriers for injuries resulting from open vestibules and in our presentation of the law applicable to the facts of this particular branch of this case we will confine our citation of authority to decisions analagous in point of fact.

Bronson v. Oakes, 76 Fed. 734, is one of the earliest and, perhaps, the leading case dealing with this subject. The law therein declared has never been overturned or modified. On the contrary, the decision is not infrequently cited approvingly by other Courts. In that

case plaintiff was riding at night in a vestibuled train and while walking through it fell through an outside vestibule door, which had been left open. A demurrer to the complaint had been sustained but this the Court held was error. The decision contains a very exhaustive and learned treatise on the question as to when a case may be decided by the Court, as a matter of law, and when it should be submitted to a jury for the disposition of disputed questions of fact. All that the Court said in that regard is germane to appellant's motion for a directed verdict but we will quote only part. The following may be found at pages 739-740:

> "Probably the most satisfactory statement of the rule, and the one easiest to comprehend and apply (Scott v. City of St. Louis, 75 Fed. 373, 377), is that given by the supreme court in Railroad Co. v. Ives, 144 U. S. 417, where it is thus stated: 'When a given state of facts is such that reasonable men may fairly differ upon the question of whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the courts.' . . . If there is any doubt as to whether all reasonable men would draw the same conclusion from the evidence, then the question must be submitted to the twelve reasonable men appointed by the Constitution to determine disputed or doubtful questions of fact."

Speaking of vestibules and the obligation of carriers with respect thereto, the Court said, at page 740:

> "The defendants were under no legal obligation

> to provide vestibuled trains for their passengers, but, having done so, it was their duty to maintain them in a reasonably safe condition. Railway Co. v. Glover (Ga.) 18 S. E. 406, 414. The purpose of the vestibuled cars is to add to the comfort, convenience, and safety of passengers, more particularly while passing from one car to another. The presence of such an appliance on a train is a proclamation by the company to the passenger *that it has provided him a safe means of passing from one car to another*, and an invitation for him to use it as his convenience or necessity may require."

At page 39 of appellant's brief the suggestion is made that perhaps appellee momentarily lost his sense of direction and mistook the open vestibule door for the door of the coach he desired to enter. Although there was no proof to that effect, we are unable to see how it would relieve or excuse appellant for its negligence in having said vestibule door and steps open. In this connection, the following language taken from page 741 of the opinion in *Bronson v. Oakes* is pertinent:

> "Moreover, that optical illusion would have been harmless but for the negligent act of the defendants. The vestibule was intended to prevent injury to the passenger while passing through it, from optical illusions as well as from any other cause. In other words, it was designed to prevent every kind of injury that could be prevented by keeping the vestibule in a safe and proper condition. The plaintiff in error was not bound to anticipate the particular act of negligence on the part of the defendant which occasioned the accident."

Although the former contention of appellant that appellee was guilty of contributory negligence, as a matter of law, has been abandoned, we can not refrain from quoting the following from pages 212 and 213 of the opinion in *Robinson v. United States Ben. Soc. 94 N.W. (Iowa) 211:*

> "It is urged that Mr. Robinson was, under the undisputed facts, guilty of contributory negligence in passing from his car to the dining car while the train was running at full speed. . . . . In a vestibule train there is no more danger in passing from one coach to another, than in passing from one seat to another in the same car. Dining cars are attached, and one of the purposes of the vestibules is to make it safe for passengers to pass from car to car. Mr. Robinson *had the right to assume that the vestibule doors were closed, and that it was safe for him to pass through.* If the railroad company had removed these safeguards, it was incumbent upon defendant to show that Mr. Robinson either knew or should have known it. It failed to make any such showing. The railroad company had made the means of passage safe, and invited him to pass, and he was not negligent in accepting the invitation. Bronson v. Oakes, 76 Fed. 740; Marquette v. C. & N. W. Ry. Co., 33 Iowa, 562."

In *Rivers v. Pennsylvania R. Co., 83 Atl. (N. J.) 883,* the four rear coaches of the train were vestibuled and while plaintiff was at night walking from one of such cars to another, for the purpose of finding a seat, there was a sudden jerk of the train and he "stepped into space and plunged down the steps and fell upon the roadbed, because the trapdoor, which, when in place,

covered the space over the steps had been removed". In reinstating a judgment for plaintiff that had been previously reversed, the Court said, at page 884:

> "Generally speaking, the legal duty of the defendant is well settled. A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate. By foresight is meant not foreknowledge absolute, not that exactly such an accident as happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. . . . And when such company has assumed to safeguard passengers using such vestibule, while the train is running between stations, by providing a trapdoor to cover the space over the steps, it is bound to use reasonable care to maintain it in proper position."

In *Crandall v. Minneapolis etc. Ry. Co., 105 N.W. (Minn.) 185,* the only negligence charged was that vestibule doors were left open between stations for an unnecessary length of time. It was held that whether the doors were allowed to remain open for an unreasonable length of time and whether said alleged negligence was the proximate cause of the accident were questions of fact and that the defendant was not entitled to directed verdict.

In *Robinson v. Chicago & A. R. Co., 97 N.W. (Mich.), 689,* plaintiff's intestate, a passenger on a train which was shown to have been lurching considerably, was last seen alive going out of one sleeping car for the

next one, which he did not enter. He was afterwards found dead beside the track. It was contended, as it is in the instant case, that to find that the deceased was thrown through the open vestibule door by the lurching of the train would be basing a judgment upon guesswork and conjecture. In disposing of this contention adversely, the Court said, at page 690:

> "It is urged that the manner in which Mr. Robinson met his death is mere conjecture, and that, therefore, there can be no recovery. This position is untenable. It is a fair inference from the evidence adduced in behalf of the plaintiff that Mr. Robinson was thrown through the vestibule door. He was seen to go out of car No. 4 for car No. 3, which he did not enter. The natural conclusion is that he either voluntarily jumped from the car through this door, or was thrown through it by the lurching of the train. There is nothing to indicate that he intended to commit suicide by jumping from the car."

In *Kearney v. Oregon R. & N. Co., 59 Ore. 12,* there was a failure on the part of the train crew to close a vestibule door after discharging passengers at the last station. The depot of the next station was on the opposite side of the track from the last one, so there was no operating necessity of longer having said door open. The train reached this next station about 2:35 o'clock in the morning. Plaintiff was riding in the car the door of which had so been left open. It was a vestibule car with a door on each side and trapdoors in the floor over the steps. Plaintiff, desiring to alight at this next

station, walked to the platform as the train was approaching it. Both doors of the vestibule were at that time open, namely, the one left open on leaving the last station and the one on the station side of the station where plaintiff was to get off. He was last observed "standing just inside the car door facing the platform." "A short distance below the station the train slowed up considerably, causing a heavy jerk." Plaintiff had two companions who preceded him. They alighted safely and, missing plaintiff, went in search of him, finding him lying beside the track about the place where the jerk of the train occurred. So far as the opinion of the Court discloses, there were no eye witnesses to the accident.

The lower Court denied a motion for a nonsuit, the grounds of which are not shown, and defendant appealed from a judgment for plaintiff. In affirming the judgment, the Court said, at page 16:

> "While the evidence might not appear to all minds to be conclusive, we are of opinion that it was sufficient to justify the Court in submitting the case to the jury. . . . It is not unreasonable to suppose that he was thrown through the front door of the car upon the platform, and fell from there through the open south door of the vestibule. . . . A natural and reasonable inference from the facts testified to by plaintiff's witnesses is that the jar of the train threw him *forward* and that . . . . he was unable to recover himself and fell off the platform through the side door."

The Justice who wrote the opinion in said case goes

on to enumerate reported cases of like happenings in language that should be a sufficient answer to the following statement shown at page 8 of appellant's brief: "The testimony offered in support of these allegations makes the accident to plaintiff one extremely difficult of explanation." There is an old saying to the effect that none are so blind as those who will not see. If appellant's counsel will once become reconciled to admitting that the true facts are as they were conscientiously found by the jury, they will no longer experience difficulty in understanding how appellee came to be injured. If appellee was thrown through the vestibule door, one can readily understand why the rear brakeman grabbed for him and missed him and appellee landed on the right-of-way. If the unreasonable and improbable story of the rear brakeman is accepted, that appellee walked up to him in the vestibule and, as though wanting to attract his attention, lightly touched him on his "right forearm near the wrist" (Record, p. 305), then you do have a situation rendering any reasonable accounting for the accident perplexing.

With respect to the sufficiency of the evidence the Court further said, at page 17 in said Kearney case:

> "We think that there was evidence sufficient to go to the jury upon the question of negligence of defendant's employees in leaving the door of the vestibule open. The object of having vestibuled trains is to assure the safety of persons who have occasion to go upon the platform. Except at sta-

tions, it was the duty of defendant to use diligence to keep the vestibule closed, and there is some evidence tending to show a lack of diligence in this instance. A vestibule with the doors closed cannot be said as a matter of law to be a dangerous place. In fact, it is nearly as safe as the car itself, and to leave the doors open when the cars were still in rapid motion was an omission from which a jury would be justified in inferring negligence."

In *Miller v. Pennsylvania R. Co., 154 Atl. (Pa.) 924*, decided April 13, 1931, plaintiff's case depended entirely upon his own testimony and a judgment in his favor was affirmed. It was urged on appeal that plaintiff's testimony "was contradictory to such extent that the jury could only have guessed as to how the accident happened." The following quotation from page 925 gives both the facts and the law:

"We have examined the record and note that plaintiff's proof as to the manner of the happening of the accident *is contained in his own testimony.* He testified that he left the car in which he was riding, intending to proceed to another car for the purpose of procuring a drink of water; that as he was passing over the platform between the two cars the train lurched with such force as it rounded a curve as to throw him through the vestibule door to the ground. . . . With these facts in evidence, it is sufficient to say, upon proof of negligence, that 'a presumption of negligence arises from an accident to a passenger when it is caused by a defect in the road, cars or machinery, *or by want of diligence or care in those employed,* or by other things which the company can and ought to control as a part of its duty to carry passengers safely.' . . . . The jury properly inferred from the

> facts presented that the car door was either left open by defendant's agents . . . . or had been improperly closed and secured following the preceding stop of the train."

We will conclude our discussion of the law relating to this branch of the case with a reference to *Northern Pac. Ry. Co. v. Adams, 116 Fed. 324*, a decision with which this Court—the Ninth Circuit—is, doubtless, especially familiar as it was rendered by it. All of the cars involved there were vestibuled with the exception of a sleeper and the train had been publicly advertised as being a completely vestibuled train. As a result of falling from the train the passenger was killed and the evidence, except as to the excessive speed of the train and its violent and unusual lurching, at the place where the passenger fell, was largely circumstantial. He was last seen alive walking through the train from the dining car towards the smoking car, between which two cars said unvestibuled sleeper was one of the cars intervening, and it was claimed that he was thrown by the lurch of the train through the unvestibuled platform of said sleeper.

The only negligence alleged in the complaint, aside from the charge of excessive speed at a curve in the track, was the leaving of an unguarded opening at the side of the platform of said sleeper or, in other words, the failure to have said platform enclosed by a vestibule. After stating that the law requires carriers "to use the best precautions in known practical use to

secure the safety of their passengers" this Court said, at pages 330-331:

> "Whether the carrier has done so or not *is a question of fact*, depending upon the peculiar circumstances of each case, *which circumstances are to be compared and weighed by the jury*, and the existence of negligence as a fact decided by them by the application of the principles of reason to such circumstances."

It was held that it was proper to submit the question as to whether it was negligence on the part of the railway company not to have said sleeper vestibuled to the decision of the jury, under proper instructions from the Court as to the degree of care owing and this Court further said, at page 331:

> "The instructions given by the trial Court in this regard were in accord with the established doctrine upon the duty of common carriers to passengers, *and with the decision of the jury upon this question we have therefore nothing to do.*"

The evidence relating to the limited issue as to whether it was an operating necessity to have the vestibule door open and the evidence relating to the issue as to whether the vestibule steps or "trap" were open, was legally sufficient to render the determination of both of said issues jury questions and the trial Court could not, without error, have directed a verdict for appellant, based upon the alleged ground that the evidence failed to show that appellant was negligent in any particular alleged with respect to the condition of the vestibule of the car as to "opening".

(d) The evidence of negligence with respect to the condition of the vestibule—as to lights and method of safeguarding—was sufficient.

We have just shown that the evidence of negligence with respect to the condition of the vestibule—as to "opening",—referring to and meaning by such term the open vestibule door and steps or "trap"—was, under the authorities cited and discussed, amply sufficient to warrant the submission of the question of appellant's negligence in that regard to the jury. There remains for consideration the question as to whether the evidence was likewise legally sufficient on the subjects of lights and the method of safeguarding the vestibule. In this connection, so far as the law is concerned, and without repeating them, all of the authorities to which we have heretofore directed the Court's attention and which are to the effect that a carrier of passengers must use the very highest degree of care to keep its vestibules and platforms safe for passage back and forth, apply.

In so far as lights are concerned the evidence shows that there were no warning lights of any kind in the vestibule and that there were no lights therein other than the ordinary dome lights which, at the best, afford none too much light and are never regarded as any notice of danger. Appellee, under the law, had a right to assume that the vestibule was absolutely safe for passage, as it had been at all times before, and if there was lurking therein a hidden danger of which he was

not aware, it was the duty of appellant to so light up and safeguard said danger as to make it readily apparent to its passengers. The fact that appellee did not observe the open steps or "trap" and the open vestibule door was proof sufficient that the vestibule was not adequately lighted and safeguarded, in view of the unknown dangerous condition existing therein.

In *volume 10 Corpus Juris at page 910*, it is said:

> "The carrier owes to the passenger the duty of protection during transportation in order that, while on the carrier's premises and *in its vehicles*, he may enjoy comfort, peace and safety. This duty of care involves warning of danger so far as such warning may enable the passenger to protect himself against an injury which might be anticipated in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given."

We print at this point a portion of appellee's testimony:

"*Q.* Now, then, state whether or not you had any notice or warning from anybody that there was an open vestibule on that coach that you were seeking to enter?

A. No, I didn't see anybody there, and I didn't hear anybody. I didn't hear anybody say anything.

Q. Was there any barrier of any kind there?

A. No.

Q. Was there any light of any sort there; any red lantern on the platform floor, to indicate there was danger on that side of the train?

A. No, I didn't notice anything of that kind.

Q. Did you notice anything there except the ordinary lights of the vestibule?

A. Just the ordinary passage between the cars." (Record, pp. 98, 99.)

So far as the Record discloses the rear brakeman, who had opened them, was the only person on the train that knew the vestibule door and steps were open and yet no care or precautions were taken to safeguard the passengers. Said rear brakeman testified that he held in his left hand a white lantern (Record, pp. 274, 275) and that he did not place any lantern or red light on the platform to warn any passenger who might be entering the coach of the open and exposed condition (Record, p. 299) and on cross-examination he admitted that the white light which he had was so held by him as to afford no aid to appellee. His testimony in that regard was as follows:

"*Q.* I mean in the position which you held it. A person coming into the vestibule to go into the next car, would not be likely to see that light, would he?

A. Not be likely to, no.

Q. And you didn't have that light there for the purpose of being any warning to passengers, did you?

A. No, sir.

Q. That was just for your own—

A. That is part of my working equipment.

Q. That is just for your own use?

A. Yes, sir." (Record, pp. 300, 301.)

The expression "method of safeguarding the vestibule" is employed in appellant's motion for a directed verdict but this is a misnomer when applied to the facts of this case. There was not only no particular method of safeguarding used but there was nothing done in that regard. Although an extraordinary condition prevailed nothing out of the ordinary was done to attract attention to it. The situation imperatively demanded additional lights and precautions, especially in view of the facts that no one was assisting the rear brakeman and he had his back turned toward the passage way. His testimony, in that connection, was:

"*Q.* And as you stood there at the back of this coach just ahead of the observation car you were—up to the time you felt somebody touch your arm, you were leaning out, weren't you?

A. Yes, sir.

Q. And you were looking towards the engine?

A. Looking forward, yes.

Q. Along the train?

A. Yes.

Q. So you had your back all during that time to the vestibule?

A. Yes, sir.

Q. And you couldn't see if anybody was in there or not?

A. No, sir.

Q. And there was nobody else there helping you?

A. No, sir." (Record, pp. 304, 305.)

The authorities emphasize the legal duty imposed upon carriers of protecting passengers against unusual dangers, which they, themselves, have *created* and in *volume 10 Corpus Juris, page 910, footnote 1(a)* we find this further statement:

> "It is the duty of a carrier to warn its passengers of dangers that arise from extraordinary or unusual conditions *which have been brought about by the acts of the carrier,* especially where such dangers are not known to the passengers, but are known to the carrier or its agents."

In *Bronson v. Oakes, 76 Fed. 734,* it was said by the Court, at page 740:

> "Whether, having provided vestibuled cars for their passenger trains, it was negligence in the defendants to leave . . . . the outside door of the vestibule open *without a guard rail or other protection* while the train was running rapidly on a dark night, *is a question of fact for the jury to determine.*"

In *Valentine v. Northern Pac. Ry. Co., 126 Pac. (Wash.) 99,* a case cited in appellant's brief, it was said by the Court, at page 102:

> "It would seem that for a much stronger reason should it be held a duty of the carrier to keep its cars so lighted as to enable passengers to avoid danger, since as to these the authorities are practically unanimous that the carrier is charged with the highest degree of care compatible with reasonable operation. When it may be reasonably assumed that the necessities of the passengers might require lights, the failure to furnish them is negligence. Western Maryland R. Co. v. Stanley,

> 61 Md. 266, 48 Am. Rep. 96-98. On the motion for non-suit the appellants were entitled to have their evidence taken as true, and all that it reasonably tended to prove taken as established. They were entitled to every favorable inference reasonably deducible from their evidence. . . . Whether a light in the passageway was reasonably necessary, and whether under all the facts and circumstances, and all the justifiable inferences to be drawn therefrom, Mrs. Valentine would not have been injured but for the lack of light, were questions for the jury."

Under the facts disclosed by the Record and the law relating thereto, there was not such an insufficiency of evidence on the question of lights and method of safeguarding the vestibule as would have warranted the trial Court in directing a verdict for appellant on that ground.

(e) Proximate cause of appellee's injury was a question for the jury.

The last ground of appellant's motion for a directed verdict is "that there was no evidence from which it could be determined that any alleged act of the defendant was the proximate cause of the plaintiff's injury, or of the accident and his resulting injury." (Assignment of Errors, Record, p. 342 and Specifications of Error, appellant's brief, p. 6.)

This ground of appellant's motion for a directed verdict is of no consequence and may with propriety be disregarded if this Court finds, as we confidently believe it will, that there was sufficient evidence of

appellant's negligence to entitle the submission of the case to the jury. It is in the nature of a rhetorical conclusion or culmination to the other grounds of the motion which precede it, for it follows, as a matter of course, that if the evidence was legally sufficient to entitle the submission of the case to jury, that carried with it the question of proximate cause.

It is our belief that the injuries sustained by appellee resulted from a combination of the several acts of negligence charged against appellant in the complaint but, under the authorities, what was the proximate cause of his injuries was a question for the jury.

In *Johnston v. St. Louis & S. F. R. Co., 130 S. W. (Mo.) 413,* no one saw plaintiff's husband fall from the train. There was evidence tending to prove that the vestibule door was open and that deceased in some manner fell through it to the roadside below. It was held that the question of *proximate cause* was a question of fact for the jury. Upon this subject the Court said, at page 416:

> "It is not essential, even to prove that defendant's negligence is the proximate cause of the injury, to produce eye witnesses in every instance. Indeed, facts and circumstances surrounding the situation are sufficient for the purpose, if they fairly suggest the defendant's negligence operated proximately to produce the hurt, and afford a reasonable inference to that effect in accordance with the known experience of men touching matters of like import, so as to indicate the result as a reasonable probability."

As stated by Mr. Justice Strong in *Milwaukee and St. Paul Ry. Co. v. Kellogg, 94 U. S. 469,* "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

We have referred the Court to the evidence and have presented authorities relating to each and every ground of appellant's motion for a directed verdict, contained in appellant's Specifications of Error and respectfully submit that it would have been highly improper for the trial Court to have directed the jury to return a verdict in favor of appellant upon any of the grounds stated in said motion. The decision of every matter and issue referred to in said motion was the rightful province of the jury. And as hereinbefore indicated, appellee was not required under the law to prove that appellant was guilty of negligence in every respect alleged in the complaint and it was legally sufficient that he prove to the satisfaction of the jury, by a preponderance of the evidence, that appellant was negligent in one or more of the respects alleged in the complaint and that such negligence was the proximate cause of his injuries. If he did this, the motion for a directed verdict in favor of appellant could not prevail.

It was not urged as a ground of appellant's motion for a directed verdict that the trial Court should, as

a matter of law, have passed upon the credibility of the witnesses and said that the testimony of the rear brakeman should be accepted as true and the testimony of appellee be disregarded and considered untrue, but this argument or contention is now advanced for the first time in appellant's brief and this Court is being asked to overturn the verdict of the jury and to say, as a matter of law, that the rear brakeman's testimony must be accepted to the exclusion of that of appellee. This contention, not being a part of appellant's motion for a directed verdict, will be referred to later under the title "The Credibility of Witnesses is for the Jury."

We will conclude our argument relating to said motion for a directed verdict with a reference to two decisions that apply to the motion generally, as distinguished from any particular part thereof. It was said by this Court in *Myers v. Brown, 102 Fed. at page 250:*

> "It is urged on the part of the plaintiff in error that each verdict was against the weight of the evidence. The *conclusive* answer to this suggestion is that *upon a writ of error the appellate court does not review controverted questions of fact.* Insurance Co. v. Ward, 140 U. S. 91; Wilson v. Everett, 139 U. S. 616."

In *Richmond & D. R. Co. v. Powers, 149 U. S. 43; 13 Sup. Ct. R. 748,* a decision expressly referred to by this Court and quoted from approvingly in its opinion in *Northern Pac. Ry. Co. v. Adams, 116 Fed. at page*

332, it was said by Mr. Justice Brewer at page 749 of said Sup. Ct. Report:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

THE CREDIBILITY OF WITNESSES IS FOR THE JURY

The contention is advanced for the first time that the testimony of appellant's employee, the rear brakeman, should be accepted as true and the testimony of appellee be rejected as untrue and this Court is asked in appellant's brief to disregard the verdict of the jury and to say, as a matter of law, that the rear brakeman's version of what occurred is true and appellee's version of what happened untrue, on the authority of *Chesapeake & O. Ry. Co. v. Martin, 51 Sup. Ct. R. 453*, a decision founded upon a totally dissimilar situation from that disclosed by the Record in the instant case.

The action brought in said *Chesapeake O. Ry. Co.* case was one to recover damages for the misdelivery of a carload of potatoes and it was not an action where there were involved many or any complicated issues of fact. The testimony of the witness in said case which the Court held should have been found to be true

related to one matter only, namely: What was the time reasonably necessary for completion of the delivery of the potatoes. The law declared in any given case must, in thereafter applying it to other cases, be carefully considered and scrutinized with respect to the facts of the particular case out of which it emanates. What is good law in one case may be very bad law if applied to another case, totally dissimilar in point of fact, and that is the situation here.

A reading of the language shown at page 456 of the opinion of the Court in said *Chesapeake & O. Ry. Co.* case shows it there stated that the witness' testimony which was disregarded was "wholly unchallenged by other evidence or circumstances"; that not only was the testimony of said witness "not shaken by cross-examination" but, indeed, that "there was no cross-examination" of said witness at all. It is further said by the Court at said page that the accuracy of the testimony of said witness "was not controverted by proof or circumstance, directly or inferentially", and, further, that said "witness was not impeached" and finally that "the only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner". How different is the situation disclosed by the Record in this case.

The testimony given by the rear brakeman was most unreasonable and improbable. It was his version of what transpired, as we have already heretofore mentioned, that while he was standing on the rear platform

of the coach from which appellee was thrown and had both arms extended and was, so appellent claims, to a great extent blocking the opening in the platform, appellee walked up to him and lightly touched him on the arm as though to attract said rear brakeman's attention and then for no apparent reason whatsoever appellee walked or stepped out into darkness and landed on the right-of-way. It was certainly for the jury to say whether this most remarkable story was true.

He admitted that he said nothing to appellee at said time and says, in effect, that although he grabbed for appellee he missed him. If appellee was not thrown by the lurch of the train and was not falling, why was he grabbing for him? And if he did grab for him, why was he not able to prevent appellee from leaving the train, if as he says appellee was at that time merely walking? These were all questions for the jury.

Unlike said *Chesapeake & O. Ry. Co.* case, the testimony of said rear brakeman was flatly contradicted by the testimony not only of appellee but other witnesses. It is suggested in appellant's brief at page 42 that the rebuttal testimony of appellee was not a sufficient contradiction of said rear brakeman's testimony, but there is no merit in this contention. It was perhaps not necessary to have called appellee in rebuttal at all because he had theretofore testified fully as to how he contends the accident occurred.

Both versions cannot be true and the acceptance

of one is the denial of the other and this Court will observe by examining the Record at pages 327 and 328 that what was asked of appellee on rebuttal was first objected to by appellant's counsel. At said pages the following appears: "*Q.* I will ask you to state what the fact is as to whether you walked or stepped from the train? *Mr. Rockwood:* I object to that as improper rebuttal. *Court:* You covered that on direct examination. *Mr. Dibble:* Was it covered the other time? *Court:* I think you did."

Said rear brakeman admitted that in announcing that an accident had occurred he said that a Sir Knight had fallen off (Record, p. 313) and the Record further discloses that to no witness called by either side did the rear brakeman say that appellee had walked or stepped from the train. The testimony of appellant's witness, Sawyer, on this subject may be found at Record, pp. 218-219, and that of appellant's witness, Bennett, at Record, pp. 241-242.

Unlike the situation in said *Chesapeake & O. Ry. Co.* case, said rear brakeman was impeached. The foundation for his impeachment by appellee's witness, Cornell, was laid (Record, pp. 313, 314) and said rear brakeman was impeached by said witness, Cornell, (Record, pp. 325-326). The foundation for the impeachment of said rear brakeman by appellee's witness, Stuart, was laid (Record, pp. 314, 315) and said rear brakeman was impeached by said witness, Stuart, (Record, pp. 326-327). The substance of said impeachment was that

said rear brakeman stated to both of appellee's said witnesses that appellee *fell* through the vestibule and *struck* his (said rear brakeman's) arm and that he reached to grab appellee but could not catch or save him.

We submit that the situation disclosed by the Record in this case is so totally dissimilar as to make the law declared in said *Chesapeake & O. Ry. Co.* case inapplicable and will conclude our argument on this point with the following quotation to be found in the decision of this Court in *Southern Pac. Co. v. Hanlon, 9 Fed. (2d) 294, at page 296:*

> "It must be remembered that the witness by whom it was sought to prove the justification or excuse was the negligent party, if there was any negligence, and he was also an interested party to the extent, at least, that he might jeopardize his position with the company if he stopped a passenger train in this manner without any excuse or justification therefor. Under such circumstances we think the question of his credibility and the weight of his testimony was for the jury alone.

"In *Quock Ting v. United States, 140 U.S. 417, 420, 11 S. Ct. 733, 734, 851 (35 L. Ed. 501)*, the Court said:

> 'Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the Court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be

contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.'

"In *Elwood v. Telegraph Co., 45 N. Y. 549, 553* (*6 Am. Rep. 140*), the Court said:

'It is undoubtedly the general rule that, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. . . . But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility, . . . and furthermore it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances, as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached.' For these reasons, we are of opinion that the questions of fact were properly left to the jury, and the judgment is affirmed."

SPECIFICATIONS OF ERROR NUMBERED 2, 3, 4 AND 5 PRESENT NOTHING FOR REVIEW

By specifications of error numbered 2, 3, 4 and 5 (pp. 6 and 7, appellant's brief) appellant asks this Court to reverse the trial Court for failing to give certain requested instructions to the jury. These specifications of error are not for consideration in this Court for the reason that appellant did not except to the failure to give said requested instructions, prior to the retirement of the jury to deliberate upon the case.

Rule 10 of the United States Circuit Court of Appeals for the Ninth Circuit provides, among other things, as follows: "The party excepting shall be required *before the jury retires* to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the Court or inserted in the Bill of Exceptions."

The rule is referred to at *page 21 of O'Brien's Manual of Federal Appellate Procedure*, in the following language: "The proper manner of reserving exceptions is a part of the procedure in error in Federal courts of review, and is not controlled by the conformity provision of the Revised Statutes. It is necessary, therefore, for counsel to specifically state the grounds of objections to the instructions given, and to reserve proper exceptions *before the jury retires to deliberate;* it is not proper for the trial judge to permit counsel to take exceptions to the charge after the jury has retired."

It affirmatively appears from the record that no exceptions were taken by appellant to the failure to give said requested instructions *until after the jury had retired to deliberate upon the case.*

As shown at pages 27–28, Record, the original Bill of Exceptions recited that the Court refused to give said requested instructions and that appellant excepted to the refusal to give the same. This would imply that appellant excepted in the time and manner provided and required by law and in conformity with said rule. But such was not the case and, therefore, appellee objected to appellant's proposed Bill of Exceptions and asked that the same be amended and that there be inserted therein a recital of what actually occurred with respect to said requested instructions and the failure to give the same.

As shown at pages 30–31, Record, and at pages 338–340 thereof, it was finally certified by the Court that the following is a true recital of what occurred upon the trial with respect to the alleged failure of the Court to give said requested instructions to the jury:

"*After the jury left the jury box and had retired,* the following colloquy ensued between counsel for defendant and the trial court and the following proceedings occurred, to-wit:

Mr. Rockwood: May we have an exception, if your Honor please, to the refusal of the Court to give requested instructions 1–2–3–4 and 4-a?

Court: That is the motion for a directed verdict?

Mr. Rockwood: Specific request to take away certain issues from the jury.

Court: You can have your exception, *but I might advise you that it will be unavailing because the Circuit Court of Appeals has repeatedly held that exception must be taken before the jury retires.*"

Under the circumstances disclosed by the record, said specifications of error present nothing for review by this Court. The purpose of the said rule is manifest and compliance with it is in furtherance of justice and the orderly conduct of jury trials. Its due observance apprises the trial Court that it is seriously contended that a certain instruction should be given to the jury, thus enabling the trial Court to look into the matter and determine, before the jury retires to deliberate, whether such an instruction should be given. To sit idly by and not take exceptions or make objection, while the jury is present and there is yet time to correct any possible error or omission, leaves the trial Court to believe that it is not insisted that any error has been committed in the instructions to the jury. It is not fair to the trial Court or the adverse litigant to defer the making of objections to or the taking of exceptions to the charge of the Court until such time as it is too late to correct a possible oversight.

The Circuit Court of Appeals for this, the Ninth Circuit, has uniformly held that exceptions to the charge, not taken prior to the retirement of the jury,

present nothing for review and no reason exists why this well-established and well-known rule of practice should be departed from. In *Fasulo v. United States, 7 Fed. (2d) 961,* this Court said at page 962:

> "The same general rule must apply to the procedure in relation to taking of exceptions *to the refusal to give instructions requested.* Exceptions must be taken after the charge and while the jury is at the bar."

The following is quoted from pages 851–2 of the opinion of this Court in *Miller & Lux, Inc. v. Petrocelli, 236 Fed. 846:*

> "We, therefore, think there is no merit in the contention that the Court below erred in admitting in evidence the testimony in respect to such warning, and still less in the contentions of the plaintiff in error in respect to the other rulings on the trial, save only those regarding the instructions to the jury, given and refused, *as to which the plaintiff in error is concluded by its failure to take any exceptions thereto prior to the retirement of the jury* for the consideration of the case and the return of its verdict. *It is too late now to question the well-established rule in this circuit that such exceptions must be taken prior to such time,* which rule is in accordance with and founded upon the decision of the Supreme Court. See Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643; Western Union Tel. Co. v. Baker, 85 Fed. 690; Star Co. v. Madden, 188 Fed. 910; Mountain Copper Co. v. Van Buren, 133 Fed. 1; Arizona, etc., Ry. Co. v. Clark, 207 Fed. 817; Copper River, etc., Ry. Co. v. Heney, 211 Fed. 459; Beatson Copper Co. v. Pedrin, 217 Fed. 43 and Alverson v. Oregon-Washington Railroad & Navigation Co., 236 Fed. 331, decided by this Court September 5, 1916."

The decision of this Court in *New York Life Ins. Co. v. Slocomb, 284 Fed. 810,* is peculiarly pertinent. There, as here, the trial was presided over by the late Judge Robert S. Bean, who advised counsel, just as he did in the instant case, that the exceptions taken to the charge and to the refusal to give certain requested instructions would be unavailing because the exceptions were not taken before the jury retired. The case is exactly parallel with the situation presented by the record in the case at bar.

In holding that the assignments of error predicated on said exceptions could not be considered and in declining to review the same on the appeal, this Court, speaking through Mr. Circuit Judge Hunt, said at page 811:

> "The company complains that the Court erred in the giving of certain instructions to the jury and in refusing to give certain instructions requested, but as no exceptions of any kind were taken with relation to the charge or to the refusal to charge before the jury retired, and though the Court advised counsel that it did not know that the exceptions interposed after the jury retired would be of any service to their client, and called attention to the necessity for excepting to the charge before the jury retired, counsel took no steps to comply with the suggestions of the Court. Under the circumstances the assignments with respect to the giving and refusing to give instructions are not for consideration here. Alverson v. O.-W. R. & N. Co., 236 Fed. 331; Miller & Lux, Inc. v. Petrocelli, 236 Fed. 846; Central R. Co. v. Sharkey, 259 Fed. 144."

In view of said well established rule of this Court and the decisions of this Court based thereon, from which we have no reason to believe this Court will now depart, none of the said Specifications of Error relating to the alleged failure of the trial Court to give said written requested instructions to the jury are reviewable. Said requests were all peremptory requests asking the Court to withdraw certain issues of negligence from the consideration of the jury, and in our argument against appellant's motion for a directed verdict we have shown that there was sufficient evidence of negligence on the part of appellant with respect to each and every issue of negligence referred to in said requests.

There was, as has already been shown, sufficient evidence to go to the jury upon the question of excessive speed and upon the question of the lurch of the train and upon the dangerous condition of the vestibule, including the steps or "trap" thereof, so that the failure to give any of said requested instructions was not error and, as above stated and shown, the failure of the trial Court to give said requested instructions presents nothing for review or consideration by this Court inasmuch as the rule of this Court was not complied with, requiring exceptions to the Court's instructions to be taken before the jury retires and while there is yet opportunity to correct any oversight or mistake.

SPECIFICATION OF ERRORS NUMBERED 6 —ABANDONED

Although in its Specifications of Error, appellant in specification 6 (page 7, appellant's brief) assigns as an alleged error the denial of its motion for a new trial, based upon the alleged ground, among other things, that the damages awarded by the jury's verdict are excessive and appear to have been given under the influence of passion and prejudice, we assume from the concluding statement of appellant's brief, page 51, that said specification of error is abandoned and is not to be urged or considered further. After expressing regret at the untimely death of the Honorable Robert S. Bean, the Judge who presided at the trial, it is stated in appellant's brief that "For this reason we shall not urge here the specification of error based upon the excessive award made by the jury."

We are at a loss to understand why this specification of error was made and the subject matter thereof discussed in appellant's brief, if its counsel are sincere in their said statement that said specification of error will not be urged and we are, under the circumstances, forced to conclude that appellant is seeking thereby to enlist unwarranted and undeserved sympathy and to try to have it appear that the unfortunate passing of Judge Bean operated to appellant's disadvantage, as distinguished from that of appellee. Appellee and his counsel deplore with equal regret the death of the

beloved trial Judge. By his passing the bench and bar are deprived of an unusually able and conscientious Judge. Every presumption and every intendment is in favor of the verdict and of the judgment entered thereon and appellee and his counsel have every right to believe that had Judge Bean lived to pass upon the matter he would have refused to disturb the verdict.

Such a ruling by him would have been entirely consistent with the trial Judge's instructions to the jury on the subject of damages and the measure thereof, to which, it is to be noted, no objection was made or exception taken by appellant. See Record, pages 335–336, where the trial Judge, among other things, said:

> "If the matter involved in this case was property which had a market value we could arrive at some reasonable estimate of the recovery, but when it comes to fixing compensation for injury to a human being *there is no fixed rule of law.* The object to be attained is, of course, just and fair compensation, *but the amount thereof must, after all, be left to the good judgment and sound discretion of the jury.*"

Such a ruling would, also, have been entirely consistent with the trial Judge's disposition of other cases heard before him. He insisted that jurors take the law from the Court but he religiously respected the jury's findings on purely questions of fact. One of the later cases tried before him, in which he refused to interfere with or disturb the jury's verdict on the *quantum* of damages and which was appealed to this Court, is *Bowman-Hicks Lumber Co. v. Robinson, 16*

Fed. (2d) 240. In affirming plaintiff's judgment in that case this Court said at page 242:

> ". . . We are not convinced that the verdict is so grossly excessive as to bring the case within the narrow compass within which an appellate court may review and revise the discretion of the trial court. There are no other circumstances suggestive of passion or mistake. Out of numerous cases the following may be cited as fairly representative: Wulfrohn v. Russo-Asiatic Bank, 11 Fed. (2d) 715; Detroit U. Ry. Co. v. Craven, 13 Fed. (2d) 352; Robinson v. Van Hooser, 196 Fed. 620; Pugh v. Bluff City Exc. Co., 177 Fed. 399; New York R. R. Co. v. Fialoff, 100 U. S. 24; Wilson v. Everett, 139 U. S. 616; New York, etc., R. Co. v. Winter, 143 U. S. 60; Lincoln v. Power, 151 U. S. 436." This case was carried to the Supreme Court of the United States, where a petition for a writ of certiorari was denied. (See 274 U. S. 736; 47 Sup. Ct. Rep. 574.)

In *Cain v. Alpha S. S. Corporation, 25 Fed. (2d) 717*, it was said by the Court at page 723:

> "The claim that the verdict is excessive was presented to the District Court upon a motion for a new trial. There was no abuse of discretion in denying that motion. The amount of the verdict is not for us to review", citing authorities, including said case of Bowman-Hicks Lumber Co. v. Robinson, 16 Fed. (2d) 240.

The fact that appellant's motion for a new trial was passed upon by a Judge, other than the one who presided at the trial, makes no legal difference and does not take the case out from the purview and rulings made by this and other Federal Courts in the cases

just cited and quoted from by us. *Section 28–776 United States Code Annotated,* pursuant to which the Honorable John H. McNary, Judge, acted in hearing and passing on said motion, expressly provides: "and his ruling upon such motion . . . . . shall be as valid as if such ruling . . . . had been made by the Judge before whom such cause was tried."

Although under another express provision of said statute, Judge McNary could, in his discretion, have granted a new trial, had he felt that he could not fairly pass upon the motion, he did not have any such feeling or take any such view of the case. He had the benefit of the entire transcript of the evidence and of all the proceedings had upon the trial, as well as exhaustive briefs, submitted by both sides. The motion was also orally argued before him and taken under advisement for study and reflection. No good legal or other reason exists why his ruling should be disturbed.

But for the rather adroit and clever manner in which, although expressly waiving and abandoning said specification of error, counsel for appellant press it on the attention of the Court, we would not have pursued the matter to the length we have, but, out of an abundance of precaution, we have done so. In the brief submitted by appellee to the District Court, in opposition to appellant's motion for a new trial, we commented upon and summarized and directed attention to the evidence, showing the permanency

of appellee's injuries and the damages sustained by him but we will not, in this brief, do so or further trespass upon the time of this Court. Relying upon said statement in appellant's brief, we will assume that said alleged specification of error 6 is not urged and has been expressly waived.

APPELLANT'S AUTHORITIES—DISCUSSED

We have read every case listed in the Table of Cases contained in appellant's brief and, taking them up in the alphabetical order in which they there appear, we will indicate, briefly, our views concerning them. We pass, without special comment, *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248; *Improvement Company v. Munson, 14 Wallace 442*, and *Larabee Flour Mills Co. v. Carignano, 49 Fed. (2d) 151*, all cited at page 13, appellant's brief, as sustaining the proposition that a mere scintilla of evidence is insufficient to support a verdict.

The expression "scintilla of evidence", when employed in this connection, denotes and means a "spark" or a "speck" or the "least particle" of evidence and relates to evidence that may, without hesitation, be fairly characterized as "trifling". The Record in the case at bar presents evidence tending to show such flagrant violations by appellant of the duties and of the extremely high degree of care owing from a carrier to its passengers and such disregard for appellee's

rights and safety that we are confident this Court will find no occasion to apply the doctrine announced in said three cases but will, on the contrary, feel that what was said by this Court in *Eastern & Western Lumber Co. v. Rayley, 157 Fed. 532,* is more appropriate. It was there said by Judge Ross, at page 533:

> ". . . . . We do not sit to determine the weight of conflicting evidence. That is the sole province of the jury in cases tried with a jury."

Having heretofore made special reference to and commented upon the case of *Chesapeake & Ohio Ry. Co. v. Martin, 51 Sup. Ct. R. 453,* cited and quoted from at pages 13, 28, 29 and 42, appellant's brief, said case will not be further noticed or commented upon in the ensuing review of appellant's authorities.

Amyot v. D. S. & S. Ry. Co., 214 N. W. (Mich.) 140, cited at page 43, appellant's brief, is so dissimilar in its facts as not to be applicable. In that case it appeared, without dispute, that the vestibule door had to be opened to disconnect the cars and because the vestibule doors had to remain open while the train was being transported on a ferry. The following quotation from page 140 is in complete harmony with appellee's position:

> "Generally, the purpose of vestibules is that those on board the train may safely pass from one car to another. The carrier having provided vestibule coaches is bound to make them safe for travel. A passenger may assume that they are safe and that they will be prudently managed."

Delaney v. Buffalo R. & P. Ry. Co., 109 Atl. (Penn.) 605, cited at pages 18 and 23, appellant's brief, insofar as it holds that no presumption of negligence arose from the happening of the accident, is contrary to the weight of authority and not in harmony with the rule announced by this Court in *Southern Pac. Co. v. Hanlon, 9 Fed. (2d) 294.*

The same may be said of *Denver & Rio Grande R. Co. v. Fotheringham, 68 Pac. (Colo.) 978,* cited at page 21, appellant's brief. It should be noted, also, that in *French v. Pacific Electric Ry. Co., 82 Pac. (Cal.) 394,* the Supreme Court of California made mention of said Denver & Rio Grande case and expressly declined to follow it. Two of the cases cited by the late Judge Rudkin in support of the rule of law announced by this Court in *Southern Pac. Co. v. Hanlon, supra,* are California decisions, showing that this Court follows California and not Colorado insofar as there exists any divergence in the authorities.

A careful reading of *Elliott v. Chicago, etc. Ry. Co. et al, 236 S. W. (Mo.) 17,* cited at page 21, appellant's brief, shows that, although plaintiff's judgment was reversed, it was not due to any insufficiency in her case. The action was brought against two defendant's, namely, the railway company and the Director General of Railroads. It was held that plaintiff's cause of action was not against the railway company but against said Director General, necessitating a reversal. The fol-

lowing language, quoted from page 20, is favorable to appellee:

> "In this case, the 'sudden, violent, and unusual movement and jerking of the train or car' is the unusual and extraordinary thing which plaintiff claims happened and caused her injury during her transportation. *If there was such an occurrence,* then the presumption of defective appliances or *negligent operation* arises; otherwise, there is no evidence whatever of negligence on the part of defendants."

It was further said at pages 20–21:

> "Plaintiff testified to two specific physical facts that cannot be disposed of so easily, namely, that the jolt and jar 'threw' her against the side of the seat and 'threw' her grip from the seat to the floor."

In citing at pages 20 and 21 of its brief *Foley v. B. & M. R. R. Co., 79 N. E. (Mass.) 765*, appellant furnishes the L. R. A. reference. The note to said case, shown at page 1076, 7 L. R. A. (N. S.), makes no comment on the ruling made in said Foley case but gives a long list of cases holding that, in instances where "violent" and "unusual" and "extraordinary" jerks or lurches are shown, the doctrine of *res ipsa loquitur* applies. The decision in the Foley case seems to unduly discount the powers of observation and the credibility of the average witness. We do not believe that any of the splendid witnesses, who testified in corroboration of appellee, were afflicted with "nervous emotion"; "exuberance of diction" or "volatility of imagination".

In *Gayle's Adm. v. L. & N. R. Co., 173 S. W. (Ky.)*

1113, cited at page 43, appellant's brief, the Court properly assumed, as shown at page 1114, "that the evidence as to the character of the jerk was sufficient to take the case to the jury".

Gulf, etc. Ry. Co. v. Wells, 275 U. S. 455, cited at page 16, appellant's brief, is not a passenger case but is one involving an injury to a brakeman, attempting to board a moving freight train. The case was controlled by the Federal Employer's Liability Act and the first ground for the ruling therein made was that there was no evidence that the engineer knew plaintiff was on the train or in a position of danger.

In *Gunning v. Cooley, 281 U. S. 90*, cited at page 13, appellant's brief, it was said at page 233 of the report of said case in 50 Sup. Ct. Rep. that "issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury".

The ruling of the Court in *Hoskins v. Northern Pacific Ry. Co., 102 Pac. (Mont.) 988*, cited at page 47, appellant's brief, was grounded, primarily, on the fact that plaintiff, a railway mail clerk, failed to prove that he was a passenger. As stated by the Court at page 990, "as the plaintiff elected to rest his case without offering any testimony as to the cause of the derailment, the burden was upon him to prove that he was a passenger." And this, the Court held, plaintiff failed to do.

Nelson v. Lehigh Valley Ry. Co., 50 N. Y. S. 63, cited at page 23, appellant's brief, is not in harmony with the

prevailing weight of judicial opinion and runs contra to the rule announced by this Court in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294.*

Norfolk & Western Ry. Co. v. Rhodes, 63 S. E. (Va.) 445, cited at page 20, appellant's brief, is inconsistent and illogical. In that case, plaintiff, while holding to a door of the train, was thrown by a violent and unusual and extraordinary lurch. After expressly stating at page 446 that the *res ipsa loquitur doctrine* applied and that from the circumstances narrated by the plaintiff a *prima facie* case of negligence was made out, the Court, nevertheless, invading the province of the jury, proceeded to hold that no negligence had been shown.

Norfolk & Western Ry. Co. v. Birchett, 252 Fed. 512, cited at pages 16 and 22, appellant's brief, is one of the earlier Federal cases in which, because of the meager showing made in behalf of plaintiff, the Court felt constrained to hold, as a matter of law, that no evidence of negligence had been shown. An examination of Shepard's Citations, to date, does not show the case to have been cited as authority or commented upon by any Court. In so far as said case announces any principle of law inconsistent with or contrary to this Court's decision in *Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294,* it is not to be regarded as authority in this—the Ninth Circuit.

Smith v. Chicago, etc. Ry., 193 N. W. (Wis.) 64, cited, in a discussion of the matter of speed, at page 47,

appellant's brief, is a case so essentially different in its facts as not to be applicable here. In that case a public highway paralleled defendant's track and it was held that the railway company was not bound to anticipate that two vehicles would collide on the highway and one be thrown on to the railway right of way and that, there being no speed limit imposed on the railway, by either statute or ordinance, no negligence as to the speed of the train was shown. In the case at bar an entirely different situation was presented. The testimony of appellant's own employes was to the effect that a "slow order", imposed by appellant, itself, prevailed at the place on appellant's right of way, where appellee was thrown from the train, and there was evidence, given on cross-examination by appellant's train crew, tending to show that said "slow order" was being grossly violated.

Southern Pacific Co. v. Hanlon, 9 Fed. (2d) 294, cited —or rather referred to— at pages 21 and 22, appellant's brief, is one of the more recent Federal decisions and is a case in which the able opinion of this Court was written by the late Judge Rudkin. It is only scantly noticed in appellant's brief and such reference as is therein made to it is in connection with a vain attempt, on the part of appellant, to distinguish it. The case is so squarely in point and so in harmony with the weight of modern judicial utterance on the legal principles discussed and decided therein, that we will, before referring further to appellant's attempted dis-

tinction of said case, make more prominent allusion to it.

In said case the plaintiff, who prevailed in the lower Court, was a passenger on a train running from Portland, Oregon, to Chico, California, and the only question presented for consideration on the railway company's appeal to this Court was the sufficiency of plaintiff's testimony to warrant the submission of the case to the jury. It appeared from plaintiff's testimony that soon after the train left Glendale, and while it was traveling at a speed of thirty or forty miles per hour, it was brought to a sudden stop by an application of the emergency brakes and that the sudden stopping and jerking of the train threw the plaintiff to the floor of the observation car.

The defendant admitted the sudden stopping but sought to avoid liability by the affirmative defense that the train was so stopped to save the life of a trespasser, whom, it was claimed by defendant, had missed his footing in attempting to board the train. Speaking for this Court, Judge Rudkin said at page 295:

> "The testimony on the part of the defendant in error," (plaintiff below) "brought the case clearly within the rule: 'When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' Atlas Powder Co. v.

Benson, 287 Fed. 797. See, also, Renfro v. Fresno City Ry. Co., 84 Pac. (Cal.) 357; Babcock v. Los Angeles Traction Co., 90 Pac. (Cal.) 780; Consolidated Traction Co. v. Thalheimer, 37 Atl. (N. J.) 132; Scott v. Bergen County Traction Co., 43 Atl. (N. J.) 1060; Paul v. Salt Lake City R. Co., 83 Pac. (Utah) 563); Fitch v. Mason City & C. L. Traction Co., 100 N. W. (Iowa) 618."

Realizing that the decision of this Court in said case of Southern Pacific Co. v. Hanlon is controlling on this appeal, counsel for appellant, after first incorrectly stating, at pages 21 and 22 of their brief, that it "is in entire harmony with the cases discussed" by them, offer this lame and futile distinction as a legal reason for the holding by this Court that the doctrine or rule, *res ipsa loquitur*, applied: they say the reason this Court so declared the law was because it appeared without contradiction that the train was suddenly stopped.

According to the argument advanced by appellant's counsel, the invoking of said doctrine or rule and its applicability to a given case depends upon whether it appears, without dispute, that the occurrence, or offending act complained of, happened. If, they say, the defendant is gracious enough to admit the offending act charged, the doctrine or rule, *res ipsa loquitur* applies, otherwise not. This is a novel and startling contention, without support or precedent in the many adjudicated cases involving or treating the subject of the applicability of the doctrine or rule, *res ipsa loquitur*,

and such contention, if upheld, would introduce a new and heretofore unheard of element.

We have examined all seven of the cases, cited by Judge Rudkin in said case of Southern Pacific Co. v. Hanlon, as supporting the holding of this Court therein: that the doctrine or rule, *res ipsa loquitur*, applied, and in not a single one of said cases did the defendant admit the doing of the particular offending act charged or did it appear, without dispute or contradiction, that the thing or occurrence complained of by plaintiff, happened. This, of itself, should be a sufficient answer to appellant's contention and shows the same to be without legal merit.

Tudor v. Northern Pacific Ry. Co., 124 Pac. (Mont.) 276, cited at page 43, appellant's brief, is so dissimilar in point of fact as not to be applicable upon the question of appellant's negligence in leaving the vestibule door open. In that case it appeared, without dispute, that the plaintiff, himself, requested the conductor to open the vestibule door. He knew the door was open and intended to pass through it in getting off at his station. It was naturally held that plaintiff could not blame the railway for opening a door which he, himself, asked the conductor to open.

Union Pacific R. Co. v. Brown, 84 Pac. (Kan.) 1026, cited at page 43, appellant's brief, is quite similar to the Tudor case, just commented upon, in that the vestibule door had been opened on the station side for the purpose of permitting plaintiff's husband to alight.

There was no evidence of any extraordinary lurch of the train and the Court merely held that it was not negligent to have the vestibule door open on the station side, for the purpose of discharging passengers. In the case at bar the vestibule door was not open for the purpose of discharging passengers and should have been closed, as the train was in rapid motion between stations.

Valentine v. Northern Pacific Ry. Co., 126 Pac. (Wash.) 99, cited at page 19, appellant's brief, is distinguishable in that there was no pleading to sustain the contention that the lurching of the train resulted from negligent operation. With respect to that contention the Court said at page 102:

> "The complaint was amended in its allegations of negligence after the evidence was in. *It contains no charge of negligent operation,* or that the roadbed was faulty or defective."

Speaking of the degree of care owing from the defendant, railway company, to the plaintiff, its passenger, the Court said at page 101:

> "As to the respondent, Northern Pacific Railway Company, the case presents a different aspect. It operated the train as a common carrier. As such it was incumbent upon it to exercise the highest degree of care, prudence, and foresight for the safety of its passengers compatible with the practical performance of the duty of transportation. *It would be liable for the slightest negligence with reference to the exercise of such care.* This is law so familiar and has been announced so often

in various forms of expression as to require little citation of authority."

Wile v. Northern Pacific Ry. Co., 129 Pac. (Wash.) 889, cited at pages 19 and 20, appellant's brief, is not in point as it involved injury to a passenger, riding on a *mixed* train, consisting of thirty freight cars and only one passenger car. In the case at bar, the train was a strictly passenger train, throughout. In its opinion in said case the Court said, at page 890:

> " 'Passengers on freight trains assume those dangers or perils which are necessarily incident to that mode of conveyance . . . . A passenger on a freight train is charged with knowledge of and assumes the *increased* hazards incident to that mode of travel, and he accepts passage with notice that the train is not equipped with all the safeguards provided for passenger trains, and the risk of injury due to this fact. . . . . The duty of the company is, therefore, modified by the necessary difference between freight and passenger trains and the manner in which they must be operated.' "

APPELLANT'S JURY ARGUMENTS —ANSWERED

Under the above Title we had intended to answer the many jury arguments contained in appellant's brief, some of which are old, in the sense that they were made upon the trial, and some new, in that they are presented for the first time in appellant's brief, but time and space will permit reference to but two of these.

Considerable reference is made in appellant's brief to the fact that at the commencement of the trial and prior to the opening statements, application was made in open Court and in the presence of the jury, and under the circumstances shown at Record, pp. 33-35, to amend the complaint. It was argued upon the trial and is urged again on this appeal that the amendment asked for and allowed changed the allegations of negligence with respect to the negligent operation of the train but an examination of the Record at the first page last mentioned will show that the amendment referred to the *place* where the alleged negligent operation of the train occurred rather than to the *charge* of negligence.

In both the original complaint and the complaint as amended it was alleged that appellant was careless and negligent in that it so operated the train as to cause it to sway and to give an unusual and extraordinary and violent lurch. Learning from the interviewing of appellee's witnesses, in anticipation of the trial, that the complaint as originally drawn was not accurate with respect to the place on the track where the negligent operation occurred, we thought it fair to correct the matter before proceeding further with the trial.

Although an exception was taken by appellant to the ruling of the trial Court in permitting the amendment, no error is assigned on account thereof and any argument based on the fact that the complaint was so amended was and is a jury argument, pure and simple,

presenting no legal point for determination by this Court.

It was argued to the jury and is again argued in appellant's brief that appellee was carefully questioned by the examining physician of appellant and gave a different statement as to how the accident occurred from that testified to by him. The cross-examination of said physician shows that he did not undertake, as a lawyer or claim agent might, to pin appellee down as to the precise facts of how the accident happened, but that, as a preliminary to his medical examination and for the purpose of qualifying himself to testify as an expert witness for appellant, he took such a general history of the case as a physician ordinarily does.

Under such circumstances, appellee would not be asked the minute details as to how he was injured. That the questioning of appellee by said physician could not have been very full or complete is shown by the fact that said physician testified on cross-examination that he did not even learn from appellee that the latter had been thrown from the train. (Record, pp. 186, 187.) This, like the matter just referred to, presents again a jury argument, namely: an argument designed to detract from the credibility of appellee's testimony.

Such argument is fully answered by the language of the Court in *Sanson v. Philadelphia Rapid Transit Co., 86 Atl. (Pa.) 1069.* In that case it was contended, much as counsel seek to contend in the instant case,

that the "deponent" was unworthy of belief because it was said that he signed a statement for an agent of the railway company containing contradictory statements with that of his deposition but the Court held that the credibility of the witness was for the jury. The following is quoted from page 1070 of the opinion in said case:

> "This contention, as we understand it, would require the Court to hold as a matter of law that the witness was unworthy of belief. *We are not familiar with any case that has gone that far.* The matters complained of affect the credibility of the witness, *but surely it is the province of the jury to pass upon this question.*"

CONCLUSION

Appellant concludes its brief with the statement that the judgment appealed from imposes a liability upon appellant "for an accident which appellant could not possibly have prevented." We feel, as the jury has found, that such statement is unwarranted and unjustified. The Record discloses glaring negligence on the part of appellant. Had it exercised any where near the degree of care and precaution that the law imposes on a common carrier of passengers, appellee would not have been thrown out of the vestibule of the train and caused to suffer the grievous and permanent injuries that have come to him, through no fault of his.

The question of appellee's negligence was submitted to the jury as the first question to be decided by it, and

by its verdict the jury has absolved appellee of any blame for the misfortune that has come to him. But one legal question is presented by this appeal, namely: Did the trial Court err in refusing to direct a verdict in favor of appellant? The authorities and Record demonstrate, beyond all question, that it would have been erroneous to have directed a verdict in favor of appellant.

The verdict of the jury was the product of *law*, rightly declared by one of the ablest trial Judges who has ever graced the Federal bench, and of *facts*, most carefully and earnestly and conscientiously inquired into and found by a jury of high type, drawn from the various walks of life. By the unanimous verdict of such a jury, after a most careful and painstaking trial, it has been adjudged that the lasting injuries which have come to appellee during the later years of an industrious and honorable life were caused by the negligence of appellant. No error appearing, the judgment should be affirmed.

Respectfully submitted,

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MALARKEY, DIBBLE & HERBRING
AND
FRANK G. SMITH
Attorneys for Appellee.

No. 6482

In the

United States Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY
a Corporation
Appellant
vs.
W. G. SHELLENBARGER
Appellee

Upon Appeal From the United States District Court
for the District of Oregon

Petition for Rehearing

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Counsel for Appellant

No. 6482

In the

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GREAT NORTHERN RAILWAY COMPANY
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Appellant

vs.

W. G. SHELLENBARGER
Appellee

Upon Appeal From the United States District Court for the District of Oregon

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Petition for Rehearing

Now comes appellant and petitions this honorable court for a rehearing of this cause, upon the following grounds:

The decision of this court, filed December 14, 1931, is clearly erroneous, because based upon an incorrect statement of the evidence. The decision holds that the evidence, if construed most favorably to appellee, required submission of the case to the jury. In stating the evidence, thus construed, this

court misread the record in the following essential particulars:

1. The court mistakenly assumed that there was evidence to show that the train from which appellee fell, or was thrown, was being operated over a track *then under construction,* and that the speed of the train was fifty miles an hour.

2. The court mistakenly assumed that there was evidence in the record to show that the trap covering the car steps was lifted at the time of the accident.

3. The court mistakenly assumed that the testimony of appellee that he did not see the brakeman in the vestibule doorway was equivalent to testimony that the brakeman was not there.

I.

The record in this case has no evidence of any kind which even suggests that the track upon which appellant's train was running at the time of the accident was *under construction.* Apparently the court misread the testimony of the witness Hanley, who explained that a new second track, parallel to the main track in use, was being constructed at the time. (Record, pp. 202-204, 206-207, 209.) The slow order affecting the speed of passing trains was not attributable to any under-normal condition of the track upon which the trains ran, but to the fact that on the right of way adjacent to the main track an-

other track was under construction. The main track upon which the trains ran was not shown to have been affected in any way.

Since the order for reduced speed obviously was for the protection of men at work during working hours (appellee's accident occurred during the night-time) faster speed over a track in good condition would not be a violation of any duty owing to a passenger. But assuming the question of speed to be material, nowhere in the record is there anything whatsoever to justify the statement of the opinion that "the appeal must be determined upon the theory that the train was going fifty miles an hour."

It is difficult to find any basis for this statement, unless the court has confused assertions of counsel with evidence upon this point. No witness testified to any such speed, and there is *absolutely nothing* in the evidence from which a jury could be permitted to deduce an inference that the train in question was running at a speed of fifty miles an hour at the time of the accident.

Appellee called no witnesses to testify as to the speed of the train. Two of appellant's witnesses, the engineer and the fireman of the train, were questioned upon this point. One estimated the speed at twenty to twenty-five miles an hour (Record pp. 223-224, 227), and the other at eighteen to twenty miles an hour. (Record pp. 250-251). The train went about a half mile before it came to a stop

and appellee's counsel sought to have these witnesses admit that this evidenced faster speed. Both declined to do so, explaining that while a train going twenty miles an hour could be stopped in a shorter distance, and while it would take a half mile or more to stop a train going fifty miles an hour, the distance required in any given case must necessarily depend upon the extent to which the air brakes were applied. Here no emergency stop was attempted; the train came to a gradual stop. (Record pp. 231-233, 235, 251-255). This testimony was undisputed. It was entirely credible and the jury could not capriciously disregard it. *C. & O. Ry. Co. v. Martin,* 283 U. S. 209. Obviously the distance traveled in making a stop gives no indication of the speed unless an attempt is made to bring the train to a stop in the shortest possible distance. See *Southern Ry. Co. v. Walters,* 52 Sup. Ct. Reporter 58 (decided Nov. 23, 1931), in which attempts to determine from the speed of a train, whether it had shortly theretofore made a stop, were condemned as guesses.

II.

There is no testimony in the record upon which the jury could find that the vestibule trap had been lifted and was open at the time of the accident. Two witnesses testified that this condition obtained when they arrived at the car platform *after the accident.* (Record pp. 80, 147). The trial court overruled an

objection to this testimony, evidently expecting that it would be supplemented by other evidence which would make it pertinent. (Record p. 147). No such testimony was presented. On the contrary it appeared that immediately after the accident, and before these two witnesses reached the car platform, a general alarm had been given, the train was slowing down, and train employes and passengers were preparing to alight to seek for and to help the injured man. (Record pp. 66-68, 283).

III.

The court is clearly in error in stating that "the testimony of the appellee that he did not see the brakeman is equivalent to a statement that the brakeman was not guarding the open trap door or the vestibule door."

Negative testimony is never the equivalent of positive testimony unless it appears (1) that the witness is in a position to see or hear, and (2) that the witness' attention was attracted to the occurrence. This foundation is necessary before testimony of failure to notice a condition can be said to conflict with direct proof of the existence of the condition; without it, the testimony is insubstantial and does not make an issue of fact for the jury. *Southern Ry. Co. v. Walters,* 52 Sup. Court Reporter 58; *Gulf, Mobile & Northern Rd. Co. v. Wells,* 275 U. S. 455; *Bergman v. Nor. Pac. Ry.*

Co., 14 Fed. (2nd) 580; *Pere Marquette Ry. Co. v. Anderson,* 29 Fed. (2nd) 479.

The testimony of appellee to which the court referred was negative in character and it was lacking entirely in the foundation necessary to make it contradictory of the testimony of the brakeman. The condition of the record in this respect is as follows:

(1) At the time of the occurrence appellee was passing through the vestibule between the doorway of the car and the opening into the vestibule of the next car. He was walking *forward.* (Record p. 98). The brakeman testified that he (the brakeman) was standing at the extreme left side of the vestibule, leaning out of the vestibule doorway and looking toward the engine. (Record pp. 281-282). It would seem beyond question that a passenger while taking a step or two across a car platform, in walking from one car to another in the nighttime, and necessarily looking forward, might or might not observe a trainman two or three feet to his left, whose body was partly within and without the opening at the extreme left side of the vestibule platform. The statement of such a passenger that he did not notice anyone in the vestibule means exactly what it says. One person, in the existing circumstances might have seen the trainman, another might not; appellee did not happen to notice whether there was anyone there. His situation was not such that his

failure to observe the brakeman denies the presence of the brakeman in the vestibule.

(2) Appellee's attention was not attracted in any way to the facts pertaining to the condition of the vestibule or to the presence or absence of a brakeman in the left doorway of the vestibule. It was nighttime but appellee did not even notice whether or not any lights were burning in the vestibule. (Record p. 115). He did not notice whether the vestibule door was open, although the current of air could hardly have escaped observation had he been giving any attention to the left side of the vestibule. He did not see or hear anybody in the vestibule; he observed only "just the ordinary passage between the cars." (Record pp. 98-99).

The very form of appellee's statement demonstrates that it lacks both of the particulars required to make it contradictory of the brakeman's testimony. He was walking forward not in a position where he would necessarily become aware of occurrences at the left of the narrow vestibule, as he took the step or two necessary to cross from the car door to the entry to the next car, and he did not profess to have had his attention directed to, or to have noticed anything about, the left side of the vestibule. His statement is therefore not in conflict with the testimony of the brakeman.

These misconceptions of the record go to the heart of appellee's case. The verdict against appellant, to be sustained, must be supported by some believable explanation of the accident. The original theory was that the train swerved suddenly because of excessive speed when turning into a siding, and that this threw the appellee sideways with sufficient force to catapult him through the left vestibule opening. This theory was abandoned at the opening of the trial.

This court has undertaken to account for appellee's strange accident upon the assumption that fast running over a track under construction caused a swaying motion great enough to destroy appellee's balance, and to lift him from his feet and throw him sideways through the narrow opening and clear of the train. This theory likewise must be abandoned.

The case as submitted to the jury was predicated upon appellee's statement that a jerk of the train caused him to lunge *forward*. No lateral movement was suggested; indeed the idea of a swaying motion was negatived. (Record p. 100). There was no claim of a sudden enforced sideways movement or of any stumbling sideways down open steps and through the vestibule doorway. Appellee knew that a jerk caused him to lunge forward when he was walking lengthwise of the train. His only explanation of what happened next is that at once he was

lifted from his feet and carried *at right angles* from his course through the narrow opening without touching handholds, brakelevers or anything else.

The train did not swerve into a sidetrack at excessive speed; there was no lateral motion due to high speed on a track under construction. Nothing occurred which could possibly have caused a passenger to leave the train in the manner described by appellee. His story is beyond belief.

This court does not try the facts. It has the duty, nevertheless, of determining whether the record, correctly read and understood, has any substantial evidence to support the jury's verdict. The Supreme Court not infrequently has had occasion to say that evidence which has no substantial weight, even though it may constitute *some* evidence on the subject, is inadequate to take a case to the jury. *Gulf, Mobile & Northern Rd. Co. v. Wells,* 275 U. S. 455; *A. T. & S. F. Ry. Co. v. Toops, Admr.,* 281 U. S. 351.

In the case at bar, appellee's inability to connect his "lunge forward" with his fall through the side vestibule doorway, his unwillingness to say definitely that the brakeman was not where he claimed to have been, and, finally, appellee's entire lack of knowledge of the conditions in the vestibule, extending even to the question of light and darkness, combine to make his testimony altogether too insubstantial to raise any conflict with the direct and

positive statement of the brakeman. The jury should not have been permitted to conjecture, upon this record, that the brakeman may not have been present in the vestibule doorway, or that there may have been some swaying or lateral movement great enough to throw appellee from the train.

We respectfully submit that the misunderstanding of the record evidenced by the opinion of this court makes a rehearing necessary. Appellee's judgment lacks the supporting evidence necessary to its validity. Appellant is entitled to have the facts reexamined and the case reheard.

CHARLES A. HART,
CAREY, HART, SPENCER & MCCULLOCH,
Counsel for Appellant.

I, CHARLES A. HART, counsel for appellant herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that said petition is not interposed for delay.

CHARLES A. HART,
Counsel for Appellant.

No. 6483

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

COVE IRRIGATION DISTRICT, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6483

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. WOOD and COOKE, of Billings, Montana,
Attorneys for Appellant and Defendant American Surety Company of New York.

Messrs. BROWN, WIGGENHORN and DAVIS, of Billings, Montana,
Attorneys for Appellee and Plaintiff. [1*]

In the District Court of the United States in and for the District of Montana.

No. 185.

COVE IRRIGATION DISTRICT, a Corporation,
Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, and OTTO SCHLUETER,
Defendants.

CAPTION.

BE IT REMEMBERED, that on February 3d, 1931, the plaintiff filed herein its renewal of request for findings of fact and conclusions of law, in the words and figures following, to wit: [2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Montana, Billings Division.

COVE IRRIGATION DISTRICT, a Corporation, Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, and OTTO SCHLUETER,

Defendants.

RENEWAL OF PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the plaintiff in the above-entitled action and renews its request for findings of fact and conclusions of law heretofore presented and filed in this cause at the close of the testimony, the same being as follows, to wit:

FINDINGS OF FACT.

1. That on or about September 28th, 1922, the plaintiff entered into a contract in writing with the defendants Schlueter Brothers, copy of which is attached, marked Exhibit "A," and contemporaneously therewith the defendants executed their bond in the sum of One Thousand Dollars, copy of which is attached to the complaint, marked Exhibit "B."

2. That the contract and the said bond were entered into and executed as one transaction.

3. That by the terms of said contract and said bond it was [3] intended by all the parties thereto that the defendants, Schlueter Brothers, should pay the accounts contracted for materials furnished and labor performed by persons employed by said Schlueter Brothers upon the work covered by the said contract or doing work under said contract.

4. It was intended by all of the parties that one of the conditions of said bond was that the said defendants Schlueter Brothers should pay all said accounts contracted for materials furnished and labor performed, and that if they did not pay the same, that the defendant, American Surety Company of New York, would pay and discharge the same to the plaintiff.

5. That there was a good and sufficient consideration for the said bond and the undertaking and said conditions thereof, of the defendant American Surety Company of New York.

6. That the irrigating canal and irrigation system of the plaintiff, the subject of said contract, at all times was and now is a public structure or improvement, and the improvements, enlargements, extensions and work covered by said contract was a public work and undertaking.

7. That the condition of said bond that the defendants would pay the accounts contracted for materials furnished and labor performed was expressly required by the plaintiff to protect against the chance that laborers furnishing work and materialmen furnishing material for said ditch work might be

left unpaid, without other security for their claims, and to insure that competent labor would be employed upon said work and that first class materials would be furnished for the same.

8. That the plaintiff let the said contract to the defendants Schlueter Brothers, in consideration for and upon the faith of said bond and the protection thereby afforded. [4]

9. That the defendants, Schlueter Brothers, employed certain other persons and subcontracted portions of the said work to such persons, in performance of said contract and doing the work covered thereby, after the execution of said contract and bond, and said work was so undertaken by such persons in reliance upon said contract and bond and the protection afforded thereby.

10. That one W. H. Queenan did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the word so done, there became due and owing to the said W. H. Queenan from the said defendants Schlueter Brothers the total sum of $4,225.00, of which no part has been paid except the sum of $2,507.38, leaving a balance unpaid of $1,737.62, which sum, together with interest thereon at the rate of eight per centum per annum from February 2d, 1923, has not been paid.

11. That one J. J. Fallman did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the

work so done, there became due and owing to the said J. J. Fallman from the said defendants Schlueter Brothers the total sum of $2,562.00, of which no part has been paid except the sum of $535.00, leaving a balance unpaid of $2,027.00, which sum, together with interest thereon at the rate of eight per centum per annum from March 1st, 1923, has not been paid.

12. That one C. F. Wickliff did and performed certain of the said work under such a subcontract, at the [5] special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said C. F. Wickliff from the said defendants Schlueter Brothers the total sum of $3,787.00, of which no part has been paid except the sum of $700.00, leaving a balance unpaid of $3,087.00, which sum, together with interest thereon at the rate of eight per centum per annum from March 3d, 1923, has not been paid.

13. That one John I. Kunkle did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said John I. Kunkle from the said Schlueter Brothers the total sum of $1,380.00, of which no part has been paid except the sum of $500.00, leaving a balance unpaid of $850.00, which sum, together with interest thereon at the rate of eight per centum per annum from December 24th, 1922, has not been paid.

14. That one Dave C. Yegen did and performed certain of the said work under such subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said Dave C. Yegen from the said Schlueter Brothers the total sum of $1,324.00, no part of which has been paid, and that the sum of $1,324.00, together with interest thereon at the rate of eight per centum per annum from February 1st, 1923, has not been paid.

15. That one B. J. Martin did and performed under such a subcontract certain of the said work and furnished labor and materials for the same, at the special instance [6] and request of said Schlueter Brothers, and under his said subcontract; that the said Schlueter Brothers failed to perform their part of said subcontract and failed to pay the said B. J. Martin as agreed upon in said subcontract, notwithstanding frequent demands made upon them; that thereafter, without the consent of said B. J. Martin, the said defendants Schlueter Brothers or their assigns displaced the said B. J. Martin upon said work and took over the said work and the materials furnished by the said B. J. Martin upon the ground and appropriated said materials and assumed control of said work and said materials and used and placed said materials in said work and the structures covered by said subcontract, leaving the said B. J. Martin wholly unpaid, and the defendants rendered it impossible for the said B. J. Martin to complete the work undertaken by him

by said subcontract; that said labor and materials so furnished by said B. J. Martin were necessary and indispensable for the construction of the said structures so undertaken by him; that because of the foregoing facts and because of the inability of said B. J. Martin to complete said work or any portion thereof, the said subcontract furnishes no basis by which to measure the amount due him for the value of the work and materials furnished; that the said B. J. Martin elected to claim the reasonable value of said labor and materials so furnished by him as the amount due him and as the measure of his compensation; that the reasonable value of the labor performed and the labor and materials furnished and delivered by said B. J. Martin was the sum of $6,753.32, no part of which has been paid, and that the said sum of $6,753.32, together with interest thereon at the rate of eight per centum per annum from December 5th, 1922, [7] is due and owing to the said B. J. Martin from the defendants upon an account for labor and materials so covered by said bond.

16. That the said B. J. Martin also did and performed certain work, labor and services for the said defendants Schlueter Brothers upon the said ditch, as part of the work undertaken by said Schlueter Brothers under said contract, done at the special instance and request of defendants Schlueter Brothers which was of the reasonable value of $643.19, and that the said sum of $643.19, together with interest thereon at the rate of eight per centum from December 5th, 1922, is now due the said B. J.

Martin from the said defendants Schlueter Brothers as an account for labor performed under said contract, no part of which has been paid.

17. That the plaintiff fully performed its part of the said contract and delivered to the said Schlueter Brothers, or their assigns, in full payment of the said work covered by said contract, the full amount of the coupon bonds or their equivalent in money, as agreed upon; and that said payment and performance by the plaintiff was done in reliance upon the conditions in said bond and contract that said defendants Schleuter Brothers would pay for the said labor performed and materials furnished and used.

18. That all of said unpaid accounts for labor and materials come within the terms and conditions of the said bond, and payment of the same was contemplated by all of the parties to said bond as the condition thereof. [8]

19. That the said construction work contemplated by said contract has been fully completed.

20. That the defendant, American Surety Company of New York, has not paid to the plaintiff any of the said amounts of the accounts so contracted by the defendants Schlueter Brothers for materials furnished and labor performed under and by virtue of their said contract, or any part thereof.

21. That none of the issues involved in the action heretofore brought by B. J. Martin against these defendants, are involved in this action, and

the adjudication in that action in no way involved any of the issues or questions here involved.

22. That none of the issues involved in the action heretofore brought by L. S. Frantz against these defendants, are involved in this action, and the adjudication in that action in no way involved any of the issues or questions here involved.

23. That at the time of the trial of this action, neither of said actions mentioned in the last two preceding findings were pending.

24. That the defendant Otto Schlueter is a nonresident of the State of Montana, and that since the commencement of this action he could not be found within the State of Montana to serve summons upon him, notwithstanding diligent search and inquiry was made to find him within the State of Montana.

25. That at the time of the execution of the contracts of which copies are attached to the answer marked Exhibit "H" and Exhibit "I," it was the intention of the plaintiff and defendant American Surety Company of New York, acting through [9] their duly authorized representatives, that the liability of the said defendant American Surety Company of New York, under the said bond, for unpaid claims and accounts for materials furnished and labor performed, being the claims in these findings mentioned, was to be reserved and was not to be relinquished by the plaintiff or discharged or in any way to be effected by the said agreements, and that said bond should remain and continue in force, unimpaired, in so far as defendants' said liability was concerned, and the said parties understood and

agreed, and in entering into and executing those said contracts, Exhibits "H" and "I," they intended to evidence their said agreement and understanding. That the proviso contained in paragraph 4 of the contract, Exhibit "I," was inserted by the parties to effectuate that very understanding and agreement.

26. That the said agreement, Exhibit "I" has not been fully performed by the defendant American Surety Company of New York, and the said defendant has not made full payment as by it agreed, as heretofore determined by this Court in the action between the plaintiff and the defendant American Surety Company of New York, heretofore tried and adjudicated.

CONCLUSIONS OF LAW.

1. That Schlueter Brothers contracted the accounts for materials furnished and labor performed under and by virtue of said contract, set out in the foregoing findings.

2. That under the said bond and by virtue thereof, the defendant, American Surety Company of New York, became and is liable for the payment to the plaintiff of all of said unpaid accounts for said labor and materials. [10]

3. That the said contract for the alteration and construction of said ditch and the said bond should be construed as one instrument.

4. That the laborers and materialmen who furnished work and material upon said ditch work had no lien upon said work or the property of the plain-

tiff for such labor and materials performed and furnished.

5. That the said B. J. Martin had the right to waive his contract with the said Schlueter Brothers and claim the reasonable value of the labor and materials furnished by him, and that the reasonable value of such labor and materials constituted his account for materials furnished and labor performed upon said work.

6. Defendant American Surety Company of New York is estopped from questioning the plaintiff's capacity to sue in this case or to recover the penalty of said bond under the condition stated in said bond upon which this action is brought.

7. That the respective judgments in the actions of B. J. Martin against these defendants and L. S. Frantz against these defendants do not serve to bar this action or to conclude the plaintiff in this action.

8. That the contract, Exhibit "I," should be reformed to express the true intent of the parties as stated in the findings of fact.

9. That so far as the plaintiff and defendant American Surety Company of New York are concerned, the contracts, Exhibit, "H" and Exhibit "I" were entered into as a part of one transaction and should be construed together as one contract.

10. That said contracts in no way affect the liability of the defendant American Surety Company of New York under its [11] said bond for which this suit is brought.

11. That the plaintiff is entitled to recover form the defendant in this suit in the amounts as determined in the foregoing findings of fact.

The plaintiff now further requests that, in addition thereto, the Court make the following findings of fact, to wit:

9½. That one B. A. Kurk did and performed certain of the said work under such a subcontract, at the special instance and request of said Schlueter Brothers, and under his said subcontract, for the work so done, there became due and owing to the said B. A. Kurk from the said defendants Schlueter Brothers the total sum of $1,473.30 of which no part has been paid except the sum of $1911.00, leaving a balance unpaid of $562.30, which sum, together with interest thereon at the rate of eight per cent per annum from January 1st, 1923, has not been paid.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Plaintiff.

Personal service of the foregoing renewal of plaintiff's request for findings of fact and conclusions of law made and admitted and the receipt of a copy thereof acknowledged this 3d day of February, 1931.

WOOD & COOKE.
By STERLING M. WOOD.

Filed Feb. 3, 1931. [12]

THEREAFTER, on February 12, 1931, the court made the following order on said request for findings of fact and conclusions of law:

ORDER ADOPTING AND APPROVING REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The within findings of fact and conclusions of law by plaintiff and objections thereto by defendant, American Surety Company, having been filed and duly submitted to the Court in the within action, and the Court being duly advised, and good cause appearing therefor from the law and the evidence according to the mandate of the Circuit Court of Appeals, IT IS ORDERED that the within findings and conclusions be, and the same are hereby adopted, approved and made as and for the findings of fact and conclusions of law by the court, with the exception of findings numbered 10, 11 and 12, which are hereby modified to conform to objections by defendant numbered 2, 3, and 4; otherwise and in other respects the objections by defendant are overruled and denied.

Dated Billings, Mont., Feb. 12th, 1931.

CHARLES N. PRAY,
Judge. [13]

THEREAFTER, on February 18th, 1931, judgment was duly rendered and entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

JUDGMENT.

This cause came on regularly for trial to the Court, a jury having been expressly waived by written stipulation of the parties on file herein. Messrs. Brown, Wiggenhorn & Davis appeared as counsel for the plaintiff and Messrs. Wood & Cooke, as counsel for the defendant, American Surety Company of New York, a corporation. Evidence on behalf of both parties was introduced, and the evidence being closed, judgment was entered in favor of said defendant, American Surety Company of New York, a corporation, that plaintiff take nothing in this cause. Upon appeal by the plaintiff from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, the said judgment was reversed and by a decree of said Court of Appeals the said cause was remanded to this court with directions to take further proceedings not out of harmony with the opinion of said Court of Appeals. On December 8th, 1930, the mandate of said Court of Appeals, upon such reversal, issued to this Court, which said mandate is now on file in this cause. Whereupon in obedience to said decree of said Circuit Court of Appeals and the opinion in support thereof and the mandate of said Court, this court has made its findings of fact and conclusions of law in favor of the plaintiff and against the said defendant, American Surety Company of New York, a corporation, upon the evidence submitted at the trial.

WHEREFORE, by reason of the law and the premises aforesaid,—

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from the defendant, American Surety Company [14] of New York, a corporation, the sum of Seventeen Thousand Nine Hundred Sixty-three and 72/100 Dollars ($17,963.72) Dollars, with interest from the date hereof at the rate of eight per cent per annum, and its costs of suit herein expended, taxed at the sum of $114.25.

Judgment entered February 18th, 1931.

CHARLES N. PRAY,
Judge of the Above-entitled Court.

Filed and entered Feb. 18, 1931. [15]

THEREAFTER, on March 31, 1931, a motion to modify judgment was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

MOTION TO MODIFY JUDGMENT.

Comes now the defendant, American Surety Company of New York, a corporation, in the above-entitled action, by and through the undersigned its attorneys, and moves the Court as follows, to wit:

To modify the judgment of February 18th, 1931, in said action and the findings upon which the said judgment was based by eliminating therefrom all

interest allowance upon the claims of the subcontractors, Fallman, Wickliff, Kunkle, Yegen, Martin and Kurk, prior to the making of the findings in said action, thereby reducing the amount of the said judgment to $10,870.40 plus interest thereon from the date of the Court's findings, and plus the taxable costs.

This motion is made and based upon the records and files in the above-entitled action, and particularly upon the bill of exceptions therein filed setting forth the evidence and other proceedings had at the trial of the said action.

Dated this 25th day of March, A. D. 1931.

WOOD & COOKE,
By STERLING M. WOOD,
Attorneys for Defendant American Surety Company of New York.

Filed March 31, 1931. [16]

THEREAFTER, on May 7th, 1931, the court made the following order on said motion to modify judgment, to wit:

(Title of Court and Cause.)

ORDER DENYING MOTION TO MODIFY JUDGMENT.

This cause heretofore submitted to the Court on the motion of defendant for modification of the judgment herein came on regularly this day for decision. Thereupon, after due consideration, Court

ORDERED that said motion be and the same is denied.

Entered in open court May 7, 1931.

C. R. GARLOW,
Clerk. [17]

THEREAFTER, on May 14, 1931, the petition for appeal and order allowing the same were duly filed and entered, being in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable CHARLES N. PRAY, One of the Judges of the Above-named Court:

American Surety Company of New York, a corporation, your petitioner, who is the defendant in the above-entitled action, feeling itself aggrieved by the judgment and order hereinafter referred to, prays that it may be permitted to take an appeal from the judgment entered in the said action on the 18th day of February, 1931, and from the order entered in the said action on the 7th day of May, 1931, denying the said defendant's motion to modify the aforesaid judgment, to the United States Circuit Court of Appeals for the 9th Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeals shall operate as a supersedeas and therefore prays

that an order may be made fixing the amount of security which the said defendant shall give and furnish upon such appeals, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeals by the Circuit Court of Appeals for the 9th Circuit.

Dated this 14th day of May, A. D. 1931.

STERLING M. WOOD,

Attorney for American Surety Company of New York, a Corporation, Defendant.

The foregoing petition is hereby granted and the appeals therein prayed for are allowed, and upon petitioner filing a bond in the sum of $500 with sufficient sureties, and [18] conditioned as required by law the same shall operate as a *supersedeas* of the judgment made and entered in the above-entitled action upon the 18th day of February, 1931, and shall suspend and stay all further proceedings in this court until the determination of such appeals by the Circuit Court of Appeals for the 9th Circuit.

Dated May 14th, 1931.

CHARLES N. PRAY,

District Judge.

Filed May 14, 1931. [19]

THEREAFTER, on May 14, 1931, an assignment of errors was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the American Surety Company of New York, a corporation, the defendant in the above-entitled action, and files the following assignment of errors upon which it will rely in the prosecution of the appeals herewith petitioned for in said action from the judgment of this Court entered on the 18th day of February, 1931, and from the order dated May 7th, 1931, denying its motion for a modification of the said judgment.

The Court erred:

1. In the making and entry of its said judgment bearing date of February 18th, 1931, in that (a) the said judgment is contrary to law, and, (b) the said judgment is not supported by the record in said action, and, (c) the findings upon which the said judgment is based are contrary to law and without evidence to sustain them as to the interest allowed prior to judgment.

2. In the denial of the motion of the defendant to modify the aforesaid judgment by the elimination therefrom of the interest allowed prior to judgment, in that the claims sued upon were each and all unliquidated prior to the findings of the Court and the entry of the said judgment.

WHEREFORE, defendant prays that the said judgment and the said order denying the modification of the same may be reversed and that the District Court of the United States for the District

of Montana be directed to enter such judgment as the [20] United States Circuit Court of Appeals for the *United States* shall deem meet and proper on the record.

STERLING M. WOOD,
Attorney for Defendant American Surety Company of New York, a Corporation.

May 14th, 1931.

Filed May 14, 1931. [21]

THEREAFTER, on May 14, 1931, a bond on appeal was duly filed herein, as follows, to wit:

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation, as surety, are held and firmly bound unto the above named plaintiff, Cove Irrigation District, a corporation, in the sum of $500.00 for the payment of which well and truly to be made we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with out seals and dated this 14th day of May, A. D. 1931.

WHEREAS, the above-named American Surety Company of New York, a corporation, has prosecuted an appeal to the United States Circuit Court

of Appeals for the 9th Circuit to reverse a judgment made and entered in the above-entitled action on the 18th day of February, 1931, and an order dated May 7th, 1931, denying the motion of the said American Surety Company of New York, a corporation, as defendant in the above-entitled action, to modify the aforesaid judgment,—

NOW, THEREFORE, the condition of this obligation is such that if the said American Surety Company of New York, a corporation, shall prosecute the said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make good its plea and will in that event comply with all the terms and conditions of the said judgment, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,
By STERLING M. WOOD,
Its Attorney. [22]

NEW YORK CASUALTY COMPANY, a Corporation.
By STERLING M. WOOD,
Its Attorney-in fact.

The foregoing bond on appeal is hereby approved this 14th day of May, 1931.

CHARLES N. PRAY,
District Judge.

Filed May 14, 1931. [23]

THEREAFTER, on May 14, 1931, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [24]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America to Cove Irrigation District, a Corporation, and to Messrs. Brown, Wiggenhorn & Davis, Its Attorneys, GREETINGS:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty (30) days from date hereof, pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States for the District of Montana, from a judgment made and entered on the 18th day of February, 1931, and from an order made upon the 7th day of May, 1931, denying the motion of the above-named defendant for a modification of the said judgment, in that certain action at law wherein American Surety Company of New York, a corporation, is defendant and appellant, and you are plaintiff and appellee, to show cause, if any there be, why the judgment rendered against the defendant American Surety Company of New York, a corporation, and the order denying the motion of the said American Surety Company of New York, a corporation, to

modify the said judgment, as in said order allowing the appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf. [25]

WITNESS the Honorable CHARLES N. PRAY, Judge of the United States District Court for the District of Montana, this 14th day of May, A. D. 1931.

CHARLES N. PRAY,
District Judge.

Due service of the within and foregoing citation on appeal and receipt of true copy thereof acknowledged this 16th day of May, 1931.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Plaintiff. [26]

Filed May 22, 1931. [27]

THEREAFTER, on May 22d, 1931, a praecipe for transcript of record was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-named Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the 9th Circuit, pursuant to the appeal allowed in the above-entitled action, and to include in such transcript of record the following, and no other, documents, to wit:

1. Request of Cove Irrigation District for findings of fact and conclusions of law, dated February 1931.

2. Judgment dated February 18th, 1931.

3. Motion of American Surety Company of New York to modify the said judgment of February 18th, 1931.

4. Minute order denying the motion of American Surety Company of New York to modify the judgment of February 18, 1931.

5. Petition of American Surety Company of New York dated May 14th, 1931, for appeals, and order allowing the same.

6. Assignment of errors in connection with the foregoing petition for appeals.

7. Bond on appeal dated May 14th, 1931.

8. Citation on appeal dated May 14th, 1931, with acknowledgment of service thereof.

9. This praecipe with acknowledgment of service thereof.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the 9th Circuit, and to be filed in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, California, on or before the 10th [28] day of June, 1931.

A transcript of the pleadings in this action and of the proceedings had at the trial of the same was prepared by your office under date of June 11, 1929, in connection with a previous appeal herein, and was duly filed in the Circuit Court of Appeals for the 9th Circuit upon the 17th day of June, 1929, as

Cause No. 5861, upon the docket of that court. Therefore, this praecipe directs you to prepare a transcript of such further record and proceedings in said action as are necessary, with the record and proceedings previously prepared, to provide the said Circuit Court of Appeals for the 9th Circuit, with a complete transcript of the record and proceedings in said action.

Dated this 21st day of May, A. D. 1931.

WOOD & COOKE,
By STERLING M. WOOD,
Attorneys for American Surety Company of New York, the Appellant Herein.

Service of above praecipe accepted and acknowledged this 21st day of May, 1931.

BROWN, WIGGENHORN & DAVIS,
By R. G. WIGGENHORN,
Attorneys for Cove Irrigation District, the Appellee Herein.

Filed May 22, 1931. [29]

(Title of Court.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume consisting of 29 pages, numbered consecutively from 1 to 29 inclusive, is a full, true and correct transcript of the portions of the record in the within entitled cause designated by praecipe filed, as appears from the records and files of said court in my custody as such Clerk; and I do further certify that I have annexed to said transcript and included in said pages the original citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of Sixteen & 75/100 Dollars ($16.75), and have been paid by the appellant.

WITNESS my hand and the seal of said court at Great Falls, Montana, this 29th day of May, A. D. 1931.

[Seal] C. R. GARLOW,
Clerk as Aforesaid. [30]

[Endorsed]: No. 6483. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a Corporation, Appellant, vs. Cove Irrigation District, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed June 1, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6483

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Brief of Appellant

STERLING M. WOOD,
ROBERT E. COOKE,
Securities Building, Billings, Montana,
Attorneys for Appellants.

Filed....., 1931

..... Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

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United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Brief of Appellant

STATEMENT OF THE CASE

This case was previously before the Court as Cause No. 5861 upon its docket. It was finally decided under date of June 2nd, 1930, by a divided court, Mr. Justice Wilbur dissenting. See Cove Irrigation District vs. American Surety Company of New York, 42 Fed. (2d) 957. Under that decision the judgment theretofore entered in favor of the American Surety Company of New York was reversed with directions to the lower court to take further proceedings not out of harmony with such decision.

After the issuance of the usual mandate from this Court, the District Court of the United States for the District of Montana, without further trial, adopted certain findings of fact and conclusions of law based upon the record theretofore made, namely, the record that came to this Court in Cause No. 5861. Thereupon judgment was entered in favor of the Irrigation District and against the Surety Company, upon February 18th, 1931, for $17,963.72, together with interest thereon and costs of suit. It is from that judgment that an appeal has now been taken to this Court.

As Cause No. 5861 upon the docket of this Court, the entire record theretofore made was before the Court and consisted of the pleadings, the judgment then outstanding, and a bill of exceptions of all of the evidence, together with the other usual papers upon an appeal. That record was printed, as in any appealed case. It was duly served as well as filed and is now a part of the permanent records of this Court. Therefore, in the proceedings upon the present appeal, or the second appeal in the case, the printed transcript of record therein, which has been docketed as Cause No. 6483, upon the records of this Court, includes merely the proceedings taken in the lower court subsequent to those embodied in the printed record here in Cause No. 5861. Thus the printed transcripts of record in Causes No. 5861 and 6483 constitute the full record in the case up to the present time. With no defined practice on the subject outlined by the rules of this Court, it seemed to us that the interests of justice would be fully subserved on this second appeal if only the portion of the record not heretofore filed in this Court was submitted as the record on such appeal. Then this Court would have, through a combination of the two transcripts, a complete

record in the case. Thereby duplication in the record of the pleadings as well as of the bill of exceptions of the evidence would be avoided and more than a considerable amount of expense saved to the litigants involved. In the praecipe for a transcript of the record upon the present appeal, that is, in docketed Cause No. 6483, which praecipe was duly served as usual upon opposing counsel, the following appears:

> "A transcript of the pleadings in this action and of the proceedings had at the trial of the same was prepared by your office under date of June 11, 1929, in connection with a previous appeal herein, and was duly filed in the Circuit Court of Appeals for the 9th Circuit upon the 17th day of June, 1929, as Cause No. 5861, upon the docket of that court. Therefore, this praecipe directs you to prepare a transcript of such further record and proceedings in said action as are necessary, with the record and proceedings previously prepared, to provide the said Circuit Court of Appeals for the 9th Circuit, with a complete transcript of the record and proceedings in said action." (Tr. (2) 24 and 25)

Opposing counsel did not attempt to have further matter included in the record upon the present appeal by a counter-praecipe to the clerk of the lower court, as might have been done under well recognized practice, and therefore should not be permitted to object to the form or sufficiency of the record herein. Furthermore, the practice followed on this second appeal appears to us to have been sanctioned by the Circuit Court of Appeals for the First Circuit in Nashua & Lowell R. Corp. vs. Boston & Lowell R. Corp., 61 Fed. 237. There the court holds, in substance, that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted from the transcript of the record when a further appeal is taken.

It will be necessary in this brief to refer to each of the two

transcripts. For convenience, the transcript in Cause No. 5861 will be referred to as "Tr. (1)", and the transcript in Cause No. 6483 as "Tr. (2)", with proper page numbers following such references.

The contention of the Appellant upon this appeal is that the allowance of interest, prior to judgment or, possibly, prior to the adoption of the findings upon the claims involved in suit, is contrary to law. The judgment of February 18, 1931, for $17,963.72, includes a large sum allowed for such interest as the findings disclose. (Tr. (2) 2 to 7) This contention is based upon the pleadings and the evidence in the bill of exceptions which, it will be argued, do not support the findings or the judgment. Under its decision (42 Fed. (2d) 957), the majority of the Court herein merely held, in substance, that the Cove Irrigation District could maintain an action to recover certain unpaid accounts of subcontractors and materialmen. No question of interest was involved or decided.

Briefly the facts surrounding this litigation are as follows: Some years ago Schlueter Brothers contracted to build certain works of irrigation for the Cove Irrigation District. Much of the work was done by subcontractors and materialmen under Schlueter Bros. These main contractors defaulted, leaving their subcontractors unpaid in whole or in part. The American Surety Company of New York wrote the usual bond to secure the performance of the contract between Schlueter Brothers and the Irrigation District. The pending suit was brought by the Cove Irrigation District to recover, for the use and benefit of the various subcontractors and materialmen, such amounts as they were unpaid for work and labor done and materials furnished. It is the contention of the Appellant here that this action by

the Cove Irrigation District, for the benefit of the persons mentioned, is in quantum meruit, for the reasonable value of the work and labor done and materials furnished by the subcontractors, et al., and that none of the claims involved was liquidated, so that interest could be allowed thereon, until the entry of the judgment of February 17th, 1931. (Tr. (2) 14 and 15)

After the case was remanded by this Court to the lower court to take further proceedings not out of harmony with the decision in 42 Fed. (2d) 957, counsel for the Irrigation District made a request for findings of fact and conclusions of law. (Tr. (2) pages 2 to 12) This request was based upon the record that came to this Court in Cause No. 5861. Hence, as stated therein (Tr. (2) 2) they *renewed* a request for findings. Thereby, in effect, they asked the Court to find that the various subcontractors and materialmen should be paid not only the balances unpaid for their work, labor and material, but also interest thereon from the time the work and labor was done or materials were supplied. The lower court thereafter made an order (Tr. (2) 13) adopting and approving such request for findings of fact and conclusions of law, with certain modifications, and over the objections of the Appellant herein. Those modifications relate only to the principal amounts of certain of the individual claims involved. Interest, however, was allowed on all of such claims from 1922 or thereabouts, when the work was done, etc., although, according to Appellant's contention, the claims were not liquidated so that they could have been paid until the adoption of the findings in 1931. The judgment herein (Tr. (2) 14 and 15) is for $17,963.72 which, of course, bears interest thereafter, or from February 18th, 1931. It is computed by taking the principal amounts allowed each claimant, which total

$10,870.40, and by adding thereto the interest here complained of, figured at the legal rate of eight per cent. per annum. A detailed statement of the amounts demanded and of the recovery allowed will be set forth later in this brief. It will suffice now to say that the principal amount demanded by the Cove Irrigation District in its complaint was materially cut down by the court's findings, although, as stated, interest was allowed thereon from the time the work and labor was done or materials supplied to the date of the findings or judgment of 1931. Thus Appellant contends that the judgment illegally includes an allowance of $7093.22 for interest, and this appeal has accordingly been prosecuted to settle that question.

Before the present appeal was taken Appellant made a motion in the lower court to modify the judgment in accordance with its contentions, by eliminating therefrom the interest allowances complained of, (Tr. (2) 15 and 16) but the motion was denied. Tr. (2) 16 and 17) The appeal herein is also from the order denying the motion to modify the judgment. (Tr. (2) 17 and 18)

SPECIFICATIONS OF ERROR

The Lower Court erred:

1. In the making and entry of its said judgment bearing date of February 18, 1931, in that (a) the said judgment is contrary to law, and, (b) the said judgment is not supported by the record in said action, and, (c) the findings upon which the said judgment is based are contrary to law and without evidence to support them as to interest allowed prior to judgment.

2. In the denial of the motion of the Appellant to modify the aforesaid judgment by the elimination therefrom of the interest allowed prior to judgment in that the claims sued upon were each and all unliquidated prior to the findings of the court and the entry of the said judgment.

OUTLINE OF ARGUMENT

ARGUMENT.

I.

MONTANA STATUTES AND DECISIONS CONTROL THE ALLOWANCE OF INTEREST HEREIN.

The record as a whole discloses, without any manner of dispute, that the Cove Irrigation District is a public corporation organized under the laws of the State of Montana, and transacting business therein. The contracts made by Schlueter Brothers, the main contractors, with the subcontractors, et al., to construct the works of irrigation, were so made in Montana, and the work thereunder was done there upon the properties of the Cove Irrigation District. Therefore, it is settled law that the right, if any, to interest on their claims of these subcontractors, et al., or of the Cove Irrigation District suing here, as it does, in their behalf, must be determined by local law, that is, by the Montana statutes and decisions.

In Bond, et al. vs. John V. Farwell Co. (C. C. A. 6th) 172 Fed. 58 and 65, the court says:

> "Interest being a matter of only local regulation, the decisions of the courts of last resort of the states are binding upon the courts of the United States."

To sustain its conclusion the court, in the last cited case, cited in part Ohio vs. Frank, 103 U. S. 697, 26 L. Ed. 531. There, quoting from one of its previous decisions the Supreme Court of the United States says:

> "The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. * * * When a different rule has been established, it governs of course, in that locality. ...*The question is always one of local law.*"

In Illinois Surety Company vs. John Davis Company, et al., 244 U. S. 376, 61 L. Ed. 1206, the court, upon page 1212 of the Lawyer's Edition Report, says:

> "The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state."

In Columbus, S. & H. R. Co. Appeals (C. C. A. 6th) 109 Fed. 177, 194, the court says:

> "But in Mortgage Co. v. Sperry, 138 U. S. 313, 338, 11 Sup. Ct. 321, 329, 34 L. Ed. 969, 978, interest upon coupons was disallowed, following the law of Illinois, the obligations being payable in that state, and according to the law of that state. In reference to the law to be applied, the court said:
>
> 'Each contract of loan was made and was to be performed in Illinois, and each bond provides that it is to be construed by the laws of Illinois. Interest upon interest, as represented by the coupons, must, therefore, be allowed or disallowed, as may be required by the law of that state. In Illinois the whole subject is regulated by statute, and interest cannot be recovered unless the statute authorizes it.'
>
> This decision accords with the general rule that, in the absence of a stipulation to the contrary, the law of the place of performance will control in respect to the subject of interest. Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540; Paley, Int. 187."

In Sloss-Sheffield Steel & Iron Co. vs. Tacony Iron Co. 183 Fed. 645, the court says:

> "Where interest is given for breach of contract, the general rule is that the rate recoverable is according to the law of the place of performance, irrespective of the law of the place where the contract was entered into or the jurisdiction in which the suit is brought. 22 Cyc. 1477; 16 Amer. & Eng. Ency. of Law, 1090; Wharton's Conflict of Laws (2d Ed.) 1227; Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261."

The law has been so stated also in effect in the following authorities, most of which are controlling, to-wit:

Holden vs. Freedman's Savings & Trust Co. et al., 100 U. S. 72, 25 L. Ed. 567.
Mass. Benefit Association vs. Miles, 137 U. S. 689, 34 L. Ed. 834.
City of New Orleans vs. Warner, 175 U. S. 120, 44 L. Ed. 96, 109.
Cromwell vs. County of Sac, 96 U. S. 51, 24 L. Ed. 681.
The County of Scotland vs. Hill, 132 U. S. 107, 33 L. Ed. 261.
City of Cairo vs. Zane, 149 U. S. 122, 37 L. Ed. 673.
33 C. J., Interest, paragraphs 16 to 20.
12 C. J., Conflict of Laws, paragraph 34, page 452.

In the next paragraph hereof consideration will be given to the character of the claims involved, as disclosed by the record. Then, in the concluding subdivision of this brief, the argument and citations will disclose that, under local law, that is, the law of Montana, where the contracts here involved were made and performed, such claims as are here sued upon do not draw interest prior to the time when they become liquidated by findings and judgment.

II.

CLAIMS INVOLVED HEREIN ARE IN QUANTUM MERUIT AND WERE ALL UNLIQUIDATED PRIOR TO FINDINGS AND JUDGMENT.

In the complaint in this action (Tr. (1) pages 1 to 18) it is alleged, in substance, that the Cove Irrigation District made a certain contract with Schlueter Brothers for the improvement of its irrigation system and that the Appellant here, the American Surety Company of New York, wrote, as surety, the bond given to secure the performance of that contract. It is then further alleged that these contractors employed various named persons to perform work and furnish materials upon the work so undertaken by them, that is, by Schlueter Brothers, and that the said persons, at the special instance and request of Schlueter Brothers, performed work and labor and furnished materials in and about the construction work for which they were either not paid at all or only partially paid. Paragraph H of that complaint, with various subdivisions thereunder, (Tr. (1) 12 to 15) relate to the claim of B. J. Martin, who was a subcontractor under Schlueter Brothers. Paragraph H-6 (Tr. (1) 14 and 15) reads as follows:

> "That the said subcontract between the said B. J. Martin and Schlueter Brothers furnishes no basis for measuring the amount due the said B. J. Martin for such labor and materials so furnished by him * * * and that the said B. J. Martin has heretofore elected to claim the reasonable value of the labor and materials so furnished by him as the amount due him and as the measure of his compensation."

Then in paragraph H-7 (Tr. (1) 15) it is specifically alleged that Martin performed work and labor and furnished and delivered materials to Schlueter Brothers, which were of a certain *reasonable value.*

It is clear, without further discussion, that the claim asserted in behalf of the subcontractor Martin is upon a quantum meruit and not upon the express contract.

The claims of each of the other subcontractors are pleaded alike. Thus in the case of B. A. Kurk it is alleged (Tr. (1) 8):

> "That under such a subcontract with said Schlueter Brothers one B. A. Kurk, between the 15th day of October, 1922, and the 12th day of January, 1923, at the special instance and request of said Schlueter Brothers, did and performed work, labor and services for said Schlueter Brothers, consisting of excavation work upon said irrigation system which were of the reasonable value of $2075.00 and which was also the agreed price therefor, and which said Schlueter Brothers contracted and agreed to pay."

Then follows an allegation of demand for payment and nonpayment of a balance claimed to be due and owing.

It will be observed that the express contract between Schlueter Brothers and Kurk is not pleaded in haec verba nor is the substance of the express contract pleaded in the complaint. Beyond the fact of employment and that the "agreed price" is identical with the reasonable value of the work, labor and services involved, the terms of the express contract are not pleaded. Nor is any breach of the express contract pleaded. Who can say from this complaint that the sum demanded was due or payable under the express contract, the terms of which are not even set forth? When and how was Kurk to be paid under the express contract? This is left entirely to speculation. Upon this ground alone it is settled law that a cause of action is not set forth upon the express contract in the complaint. Thus, in 13 C. J., page 731, under the subject of Contracts, paragraph 863, the author says:

> "There can be no recovery unless the complaint sets forth

> a breach by it of the contract in suit. It is not enough to show a right of action against it, that the promise or covenants of the respective parties are fully set out, with the averment of performance on the part of plaintiff; plaintiff is bound to go further and in due form to assign such breaches of its promises or covenants as are relied on as grounds for a recovery of damages."

On the contrary, all of the elements of a cause of action in quantum meruit are alleged. Thus in 40 Cyc 2839, the author says that a complaint upon quantum meruit:

> "Must show that the services were actually rendered, by whom they were rendered, and that they were not rendered gratuitously. Non-payment of the debt set out must be alleged."

Furthermore, if the portion of the complaint here being considered was designed to state a cause of action upon an express contract why is the allegation made therein that the work, labor and services "were of the reasonable value" of so much? The purpose of the pleader in setting forth, as has been done, that the reasonable value and agreed price are synonymous, is plain, and merely confirms the contention here made that the cause of action stated is in quantum meruit and not upon the express contract. Thus, in Donovan vs. Bull Mountain Trading Company, 60 Mont. 87, 198 Pac. 436, the Supreme Court of Montana has said:

> "Where a recovery is sought as in quantum meruit, and the evidence reveals a special contract, the measure of recovery is to be limited to, or must not exceed the amount specified in the contract."

Clearly the pleader has invoked the rule announced in Montana in Clifton, Applegate & Toole vs. Big Lake Drain District No. 1, 82 Mont. 312, namely:

> "A contractor may, on breach of the contract by the other party to it by refusal to make a payment becoming

> due to him during the progress of the work as provided therein, discontinue work and elect either to sue upon the contract to recover damages for its breach, or ignore the contract and bring action on quantum meruit."

In other words, the pleader has elected to sue in quantum meruit because of a breach of the express contract. The claims of the remaining contractors are pleaded in identical language, with the exception of the claim of Martin, which, as pointed out, is expressly alleged to be in quantum meruit.

But turning to the evidence in the bill of exceptions it will be found that the engineer on the job was permitted to say how much work most of the subcontractors did and what they should be paid. (Tr. (1) 164) The reasonable value and agreed price of work done by two other subcontractors was stipulated. (Tr. (1) 150, 151) Wickliff, another subcontractor, testified that he bases his claim on "force account" (Tr. (1) 159) because he never got any remittances under his contract. That claim, of course, is in quantum meruit. No effort was made to prove the different terms of the several express contracts between the individual subcontractors and Schlueter Brothers, although in the amended and supplemental answer of the Surety Company (Tr. (1) 27) the allegations of the paragraphs of the complaint, (Tr. (1) 7 to 16) relating to the contracts between Schlueter Brothers and the individual contractors, are expressly denied.

In the light of the foregoing analysis of the record it seems obvious, without further comment, that the claim of each subcontractor, as made by the Cove Irrigation District herein, is upon a quantum meruit and nothing else. Supplementing the reference, supra, to the case of Donovan vs. Bull Mountain Trading Company the following is quoted from State of Min-

nesota vs. Davis, 17 Minn. 429, 438, which was an action in quantum meruit, viz:

> "It seems to us that the defendants having in effect prevented the performance of the special contract, this action lies to enable the plaintiff to recover such compensation for his services and materials as may be reasonable in view of the facts of the case. But as the plaintiff has the right to insist that he shall not lose anything by the fault of the defendants in thus preventing the performance of the contract, he has a right to claim that he shall receive as much for such materials and services as he would have received for the same if he had gone on and completed the special contract. *For this purpose it was naturally proper for him to refer to such a special contract (in his pleadings) as furnishing a basis upon which the amount of his recovery might be estimated.*"

Also in Joern vs. Bank (Mo.) 200 S. W. 737, syllabus 1 of the case reads as follows, to-wit:

> "A contractor's petition for work and material, setting forth the contract, though not alleging that it was not completed, but enumerating the reasonable value of the materials furnished and services rendered, at the request of the defendant, and stating the amounts sought to be charged therefor, was a declaration on a quantum meruit and not on contract."

See also Puterbaugh vs. Puterbaugh, (Ind.) 33 N. E. 808.

The effect of these authorities is to establish clearly that mere incidental reference, as here, to an express contract does not make the claims here involved suits upon that contract.

In C. M. & St. P. Railroad Company vs. Clark, 92 Fed. 968, 975, the Circuit Court of Appeals for the Second Circuit holds that the term "unliquidated," as used in connection with creditors' claims, means that the creditors:

> "Must bear some further burden in order to have their amounts so fixed that the debtor would be bound thereby."

Then the court further says:

> ....."*This is always the case where the creditor's claim rests upon a quantum meruit.* Thus, where a physician charged $5 a visit for 126 visits, and $10 each for 4 consultations, no agreement having been made in advance as to the rate to be charged, the court said: 'The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were reasonably worth. From the very nature of the case, a further agreement must be reached by the parties, fixing the value of the services, or else resort must be had to a judicial determination for that purpose.' Fuller v. Kemp (1893) 138 N. Y. 236, 33 N. E. 1034. In that case the consideration on which accord and satisfaction was sustained was the giving up by the debtor of his right to compel the plaintiff to resort to judicial determination to fix the quantum meruit of the visits he did make, even if there were no dispute as to their number. And it is manifest that it makes no difference, when such claim is being adjusted, that the creditor agrees to a quantum meruit which he was always willing to pay; because, so long as the fixation of the amount rested merely on his good will, he was still in a position to change his mind. He could still, in perfect good faith, verify an answer which would make it necessary for the creditor to 'liquidate' his claim by a lawsuit."

In the next subdivision of this brief and in connection with the further argument then made many authorities will be cited on the point that a claim in quantum meruit is an unliquidated claim.

The claims here sued upon were unliquidated in every sense of the word because it took a trial, evidence and findings of the court to fix the amount of the liability of the Surety Company. The quantities of material removed, etc., had to be determined by evidence, the amount and kind of material supplied and the reasonable value therof, before it was possible for anyone to say what amount, if any, the Surety Company should pay.

The Surety Company expressly denied the liability asserted and the reasonable values alleged (Tr. (1) 27) and the Irrigation District was put to its proof. Then, too, it was necessary for the lower court in the exercise of its discretion, the case having been tried to the court without a jury, to determine to what extent, if at all, the evidence supported the claims pleaded in the complaint. In other words, the "reasonable value" of the labor and materials, for which this suit is prosecuted, required determination, and prior to determination, particularly where, as here, the claims of the Plaintiff were disputed by the answer of the Surety Company, nothing short of a judicial determination could fix the amount payable by the Surety Company. Thus, on general principles, apart from any statutory rules or decided cases, there would appear to be no common sense reason why the Surety Company in such a suit should be required to pay interest until the amount of its liability was fixed and determined by judgment. But this phase of matters and the rules of law applicable in such cases will be fully discussed in the next subdivision of this brief.

III.

UNDER LOCAL LAW ALLOWANCE OF INTEREST PRIOR TO LIQUIDATION OF CLAIMS BY JUDGMENT IS PROHIBITED WHERE, AS HERE, SUIT IS IN QUANTUM MERUIT.

Before citing the statutes and decisions in Montana that announce the rule contended for in this subdivision hereof, the attention of the Court is respectfully invited to the fact that the law generally is as stated, namely: that unliquidated claims do *not* draw interest until they have been merged in judgment, and that claims in quantum meruit are of this class. Thus in 33 C. J., Interest, page 211, paragraph 71 and 72, the author says:

> "Although it is competent for the parties to agree to pay interest on an amount as yet unascertained and to be liquidated in the future, the general rule * * * is that interest is not recoverable upon unliquidated demands, but is allowable only after such demands shall have become merged in a judgment. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped. * * * The general rule which denies the right to interest on unliquidated demands has found very frequent application in the case of unliquidated demands for services rendered, which as a general rule do not bear interest until rendition of judgment."

Numerous cases are cited in the note to the text, some of which will be specifically mentioned later herein, holding that a claim in a quantum meruit for work, labor or materials is within the rule.

It is of very great interest also to note the decision of this Court in Valentine vs. Quackenbush, 239 Fed. 832. There the Court considers a statute of Alaska that is, in substance, the

same as an Oregon statute regulating interest allowances. In effect, we consider that the statute so involved is the same as the Montana interest statutes. None of these statutes provides for interest on what may be called unliquidated demands. The Court, in the Quackenbush case, treats the demand there involved as unliquidated. It is one that was disputed by the defendant, even though the suit was upon an express contract. Hence the judgment was modified by eliminating therefrom interest prior to such judgment.

But this Court is primarily concerned here with the interest rule in Montana, or the local law on the subject. Such local law governs the case and is controlling upon the federal courts, as has been pointed out under Subdivision I of the argument herein.

In the very early case of Palmer vs. Murray, 8 Mont. 312, 21 Pac. 126, the Montana court laid down the doctrine, as stated in the syllabus of the case, that:

> "No interest can be recovered on an unliquidated demand until the amount thereof has been ascertained."

For the convenience of the Court, as well as for clarity of argument herein, we quote the following from the Court's decision, viz:

> *"Where interest, eo nomine, is asked for on* the amount demanded as damages, *it must be allowed or denied as provided in the statute.* * * * The obligation of the defendant was to repair the injury done * * * but it did not certainly extend to the obligation to pay interest, for that is a separate and distinct obligation, which could exist only by contract, and in the absence of any express agreement under the provisions of the law itself; for it has been repeatedly said that interest is a creature of the law. The law making power in Montana has undertaken to regulate the rates of interest, and to specify the contracts and debts which shall

bear interest, in the absence of any express agreement therefor. * * * *The statute regulates interest* in a variety of cases in which there is no agreement, *and it will be noticed that it includes all kinds of demands, except those for damages or unliquidated claims.* After enumerating such a number of cases in which interest is to be allowed in the absence of any agreement, it is hardly to be contended that it would leave open the question of interest on so important a subject as that of damages. We have no doubt that it was never the intention of the law to allow interest on demands for damages from the date of the act complained of, but only from the date of the damage when ascertained by judgment. * * * *The general rule is deducible that interest is not to be allowed on any demand except from the day on which the exact amount is ascertained.* Does any reason satisfactory to the mind exist, why interest should be denied to the creditor until there has been a settlement agreed upon, and yet allowed on an unascertained and disputed demand for damages, long before it can be known whether any debt or liability on the part of the defendant actually exists? In order to determine in this action whether any debt, and if so, what amount, actually existed on the part of the defendant, it took the judgment of the court to so decide. * * * I take it to be the rule, in the absence of any agreement, that interest eo nomine will not be allowed except when the statute permits. This construction of the statute is under the well known rule of interpretation found in the maxim of expressio unius est exclusio alterius. *Having specified the cases in which interest shall antedate the judgment, the natural conclusion is that the law maker intended to exclude or deny the right in instances not so enumerated."*

In the Palmer case the court refers to its previous decision in Isaacs vs. McAndrew, 1 Mont. 437, 454. There, *in an action in assumpsit* for money paid, laid out and expended for the defendant, the court specifically held that interest was not allowable under the terms of the statute. The statute so construed is found in the laws of 1865 of the Territory of Montana at page 535, and reads as follows, viz:

"Creditors shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the Territory, from the day of entering up such judgment until satisfaction of the same be made; likewise on money lent, or money due on the settlement of accounts, between the parties and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay."

This statute is practically the same as Section 1257, 5th Division, Compiled Statutes, 1887, that was construed in Palmer vs. Murray, supra. The 1887 statute in question reads as follows: viz:

"Creditors shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment until satisfaction of the same be made; likewise on money lent, or money due on the settlement of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay."

It thus follows that a claim in assumpsit, under either of the statutes, supra, is an unliquidated one upon which no interest is allowable prior to judgment. A suit in quantum meruit is, of course, in assumpsit and one of the common counts.

5 C. J., Assumpsit, Action of, Sec. 5, pages 1380 and 1381.

The only Montana interest statutes that could possibly have

any application in the suit at bar are the following sections of the Revised Codes of Montana, 1921, namely:

> "Section 7725. Legal interest. Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent. per annum after they become due on any instrument of writing, except a judgment, on an account stated, and on moneys lent or due on any settlement of accounts from the date on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period of less than one year, three hundred and sixty-five days are deemed to constitute a year."
>
> "Section 8662. Person entitled to recover damages may recover interest thereon. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

It is clear that the 1921 statutes, supra, do not allow interest upon unliquidated claims any more than did the Statute of 1887, construed in Palmer vs. Murray, supra. Under Section 7725, supra, written instruments for the payment of definite sums, accounts stated, moneys lent or due on settlement of accounts, and moneys received to the use of another and detained from him, bear interest. In other words, the claims there involved speak for themselves and fix the amount to be paid. They are liquidated and draw interest accordingly. Under Section 8662, the same rule is applied to damages that are certain, or that can be made certain by a mere calculation. Hence, there is no substantial difference between the statutes of 1865, 1887 and 1921. As we have pointed out, supra, and will by many citations hereinafter in this brief, a claim upon quantum meruit is not certain

or capable of being made certain by mere calculation. The damages to be awarded in a suit in quantum meruit depend upon no fixed standard and are referred to the discretion of a jury, or of a court if the case is tried to the court without a jury, and such damages cannot be made certain except by accord, verdict or judgment, as the case may be. It is submitted, therefore, that Isaacs vs. McAndrew, supra, is decisive here.

No case has been found in Montana construing Section 8662, supra, in its relation, if any, to claims upon quantum meruit. However, California has an *identical* statute, to-wit: Section 3287 of its Civil Code. The California courts have uniformly held that, where plaintiff's claim is based upon a quantum meruit, said Section 3287 has no application, and that interest is not allowable there upon such a claim prior to judgment.

The California cases relied upon will be cited and referred to presently herein. First, however, we call the Court's attention to the well settled rule in Montana, announced in Mares vs. Mares, 60 Mont. 36, 199 Pac. 267, as stated in paragraph 2 of the syllabus of the case, viz:

> "Adoption of a statute from another state carries with it the construction placed thereon by the highest court of the state from which it is adopted."

The only rational conclusion to draw from the fact that the Montana and California interest statutes mentioned are identical is that the Montana statute was taken from California with the constructions placed upon it there.

We now take up the constructions of the California interest statute, Section 3287, of its Civil Code. The fact that claims upon quantum meruit, as here, do not draw interest under this interest statute is made exceedingly plain in Farnum, et al. vs.

California Safe Deposit & Trust Company, et al. 96 Pac. 788. The following is quoted from the decision in that case:

> "Appellants claim that the judgment is erroneous, in that it allows interest on all the claims from the date of the beginning of the suits. They argue that all the claims were disputed, and unliquidated, and that there was no way short of litigation by which appellants, who were strangers to the arrangements between the owners and the lien claimants, could ascertain what the proper amounts were. Its right to recover on all the claims was vested in the lienholders at or before the suits were commenced. Farnham's and Vockel's claims were for services at a fixed rate of compensation per day. The claims of the California Mill & Manufacturing Company, of the Humboldt Lumber Company, and of W. L. Taylor were for materials sold at the market prices. McCarl's claim was not allowed. *The claim of Weeks was upon a quantum meruit. All the claims except the last one were capable of being made certain either by computation or reference to market rates,* and consequently respondents were entitled to recover interest thereon. Macomber v. Bigelow, 126 Cal. 15, 58 Pac. 312; *Civ. Code, Sec. 3287. The claim of Weeks being for the reasonable value of his services was not capable of being made certain by calculation, and hence was not entitled to bear interest prior to the judgment. The judgment should be modified in this respect.* Cox v. McLaughlin, 76 Cal. 67, 18 Pac. 100. 9 Am. St. Rep. 164; Fox v. Davidson, 111 App. Div. 174, 97 N. Y. Supp. 603; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 379, 44 Pac. 719."

In Burnett, et al. vs. Glas, et al. (Cal.) 97 Pac. 423, the Supreme Court of that state considers an action for the foreclosure of certain mechanics' liens. We are concerned here as to that case with the claims only of J. A. Dyer and of Watkins & Thurman. The Court, in setting forth the character of the claims of these persons in the decision says:

> "J. A. Dyer furnished materials under contract with the contractor for which the contractor agreed to pay 'the reasonable market price thereof from time to time as the same

were furnished and as the work on said building progressed;' * * * Watkins & Thurman furnished materials 'to be paid for at the regular and usual market price in cash upon delivery of the same'."

In other words, these claimants sought to recover in quantum meruit for the reasonable value of materials instead of at an agreed price for the same. In determining the right, if any, of these claimants to interest, the Supreme Court of California in the decision in question says:

> "We are of the opinion that the claim of appellants that claimants Dyer and Watkins & Thurman were not entitled to interest prior to judgment is well founded. As to each of these claims, the amount due was unliquidated and not capable of being made certain by calculation until fixed by the judgment. The rule applied to such claims in Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, namely, that interest prior to judgment cannot be allowed, was applicable. See, also, Stimson v. Dunham, etc. 146 Cal. 285, 79 Pac. 968. The judgment must be modified in this respect."

In Clark vs. Conley School District (Cal.) 261 Pac. 721, the court says:

> "It is argued that the trial court erred in refusing to allow the appellant interest from the time when the services were rendered until the date of the judgment. The argument is basd upon the rule that appellant's recovery was capable of being made certain by calculation (Civ. Code 3287) because the contract fixed his compensation at 6 per cent. of the cost of construction of the buildings. We have already said that this fee was based upon his services to be rendered not only in the preparation of plans and estimates, but also in the supervision of the construction of the buildings. If the cause were being tried upon the first cause of action alone, it may be that evidence could be had of the prevailing customs and of the surrounding circumstances which would justify an interpretation of the contract fixing a promise to pay for the services rendered in the preparation of plans and estimates in the event the building program was abandoned and in such a case the

certainty of the amount due might be easily determined by mere calculation. But so far as appears from this record, such evidence was not before the trial court, and in any event no finding was made thereon. *The judgment was manifestly given on the third cause of action alone—an action in quantum meruit.*

The reasonable value of services rendered was the precise question to be determined by the trial court upon the evidence offered under that cause of action, and the *amount due thereunder could not be determined by mere calculation.* Such being the case, *the claim should bear interest from the rendition of the judgment only.*"

In Shellenberger vs. Baker, et al. (Cal.) 281 Pac. 1102 an attorney brought suit in quantum meruit for the reasonable value of legal services and recovered a certain sum with interest thereon from the date of the termination of services which he rendered ,although his suit was not brought until sometime thereafter. The court modified the judgment by striking the interest allowance therefrom. The following is quoted from the decision of the court, namely:

"Appellant also contends that the trial court erred in awarding interest to Plaintiff at the rate of 7 per cent. per annum on the sum of $650 at the date of the termination of the services rendered by plaintiff to defendants.

Perhaps the leading case in this state on the question thus presented is that of Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164. It is there held that: 'In an action to recover the reasonable value of services performed by the plaintiff, the amount, character, and value of which can only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates, the plaintiff is not entitled to interest prior to verdict or judgment.'

To the same effect see Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719; Macomber v. Bigelow, 123 Cal. 532, 56 P. 449.

In the case of Erickson v. Stockton & Tuolumne County

R. R. Co. 148 Cal. 206, 82 P. 961, it is held that interest is not recoverable on an unliquidated claim for the value of services rendered even from the time of the commencement of an action. See, also, Gray v. Bekins, 186 Cal. 389, 199 P. 767; Tryon v. Clinch, 44 Cal. App. 629, 186 P. 1042; Hind v. Uchida Trading Co. 55 Cal. App. 260, 203 P. 1028; Arocena v. Sawyer, 60 Cal. App. 581, 213 P. 523; Diamond Match Co. v. Aetna Casualty, etc. Co., 60 Cal. App. 425, 213 P. 56; 8 Cal. Jur. 789, 790, 796, and cases there cited."

The reason for the rule so announced by the California courts is well set forth in Cox vs. McLaughlin, referred to in the California case, supra. There the court said:

"The case at bar is not an action upon an express contract between the parties. Such a contract, it is true, existed; and, had plaintiff recovered under it, he would have been entitled to interest upon the several payments provided for therein from the dates at which they fell due, but for reasons not now necessary to be enumerated a recovery upon the contract has been abandoned, and plaintiff counts upon a quantum meruit, for the performance of labor and services, precisely as he might have done had there been no contract. His services, and the material furnished by him, were uncertain as to amount, character, value, and time of payment, until fixed by a verdict or findings of the court. They were not of a character to have a fixed or ascertainable market value. They could not be ascertained by computation, either in extent or value. Defendant was not in default for not ascertaining that which, outside of the abandoned contract, he could not ascertain except by an accord, or by verdict or its equivalent."

It is respectfully submitted that these California cases effectually construe the Montana interest statute in question, Section 8662, supra. The law has been settled in California from the first that claims upon quantum meruit do not draw interest prior to findings or judgment. For the reasons set forth, supra, such, too, is the law of Montana.

And De Young vs. Benepe, 55 Mont. 306, 176 Pac. 609, the demands involved were upon a quantum meruit. Thus the court said:

> "Plaintiff brought his action in assumpsit instead of on the special agreement, upon the theory that having fully performed the agreement on his part he was at liberty to count on the implied assumpsit, limitation of recovery being the stipulated price."

It will be observed from a reading of the case that no interest was claimed or allowed.

In Daley vs. Kelley, 57 Mont. 306, 187 Pac. 1022, a suit in quantum meruit (page 311) where an express contract between the parties had been involved, the plaintiff recovered $800.00 only, without interest, (page 308) and the judgment was affirmed on appeal.

In Callan vs. Hample, 73 Mont. 321, 236 Pac. 550, the court again considers an action upon a quantum meruit wherein a principal sum only was recovered without interest.

While the question of interest was not involved or decided in the foregoing Montana cases, nevertheless they seem pertinent here. Litigants in Montana are neither claiming nor recovering interest in actions in quantum meruit.

Perhaps it will be contended in this Court that in Hefferlin, et al. vs. Karlman, et al. 29 Mont. 139, 74 Pac. 201, the point here involved has been decided adversely to our contention. It is only necessary to examine the decision to find that such is not the case. There the court refers to the pleadings and epitomizes them as follows, to-wit:

> "In the first count plaintiffs allege themselves to be copartners * * * Then follows an allegation that between the 15th day of September, 1899, and the 21st day of December, 1899, the plaintiff sold and delivered to the

> defendants, at their request, goods, wares and merchandise amounting to, and of the value of $1679.74, *which sum the defendants agreed to pay plaintiffs,* and that no part thereof has been paid."

An express agreement between the parties is thus pleaded and the allowance of interest made was proper. The action is not in quantum meruit and, therefore, the decision is not in point here. In a suit in quantum meruit the reasonable value and not the agreed value of goods, wares and merchandise is demanded.

Leggat vs. Garrick, 35 Mont. 91, 88 Pac. 788, may also be relied upon by the opposition to refute the contentions of the Appellant herein. In that case the action was one to recover a "balance of $100 for professional services rendered." Clearly it was one upon an express contract for a stated balance. The court allowed interest under the rule announced in Hefferlin vs. Karlman, supra, thus further establishing that the plaintiff sued for an agreed amount.

The Montana court is plainly limiting interest allowances to express contracts where a definite amount has been agreed upon as compensation. This rather clearly appears from Clifton, Applegate & Toole vs. Big Lake Drain District No. 1, 82 Mont. 312, 267 Pac. 207. There an estimate under a contract was not paid when allowed by the engineer. The court, upon appeal directed the entry of a judgment by the lower court for the amount of the estimate plus interest from the date when payment thereof was improperly refused, and relied in this connection upon Section 8662, supra, Revised Codes of Montana, 1921, and Hefferlin vs. Karlman, supra. In other words, the statute, as well as the decisions mentioned, relate entirely to express contracts where a definite amount of damages is involved or an

amount that can be made certain by mere calculation.

The circumstance must not be overlooked herein that the irrigation district sought to recover the principal sum of $19,284.95 in its complaint. The findings of the court gave it the principal sum of $10,870.40 or $8414.55 less than it tried to recover. The judgment herein for $17,963.72 is accounted for by the fact, as hereinbefore pointed out, that interest has been added to the above mentioned principal sum of $10,870.40, that is, interest running from 1922 and 1923, or thereabouts, to the date of the findings or judgment. The following statement shows the amount demanded and recovered for the use and benefit of the various claimants, namely:

	Amount Demanded	*Amount Recovered*
B. A. Kurk	$ 1163.20	$ 562.30
E. C. Riley	1,081.45	.....
W. H. Queenan	1,542.62	.....
C. F. Wickliff	3,787.00	368.83
J. J. Fallman	2,110.17	368.76
John I. Kunkle	880.00	850.00
Dave C. Yegen	1,324.00	1,324.00
B. J. Martin	6,753.32	6,753.32
B. J. Martin	643.19	643.19
	$19,284.95	$10,870.40

This detailed information does not clearly appear from the record herein but the figures as given are correct, as opposing counsel must necessarily concede. The interest allowances prior to findings and judgment on the several amounts recovered are clearly in contravention of the statute. These several amounts were not liquidated until the findings were made. Therefore, under the local law such amounts draw interest only from the date of the findings or judgment.

For all of the reasons set forth in the foregoing brief it is clear that the interest allowances made prior to the findings of the Court are contrary to law. To this extent the judgment entered is erroneous and it should be modified accordingly by the elimination therefrom of the sum of $7093.32, namely the difference between the principal amounts recovered, $10,870.40, and the principal amount of the judgment, $17,963.72.

Respectfully submitted,

STERLING M. WOOD,

ROBERT E. COOKE,

Attorneys for Appellant.

Service of the within and foregoing brief and receipt of copy thereof acknowledged this.....day of October, A. D. 1931.

BROWN, WIGGENHORN & DAVIS,

By.....

Attorneys for Appellee.

No. 6483

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—v.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Brief of Appellee

BROWN, WIGGENHORN & DAVIS,
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Billings, Montana,
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Filed....., 1931

..... Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—v.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Motion to Dismiss Appeals

Comes now the appellee in the above entitled cause and moves this Honorable Court to dismiss the appeals filed herein, and for cause shows:

1. That no proper or sufficient record has been filed or presented and the Transcript of Record fails to present any error subject to review.

2. No evidence has been incorporated in the record and none has properly been presented for review.

3. No Bill of Exceptions has been settled or allowed or incorporated in the record.

4. The record does not exhibit or present any exceptions to the court's rulings, taken or preserved, and particularly no exceptions or objections to the court's Findings of Fact and Conclusions of Law complained of, appear.

5. That there is no proper Assignment of Errors in the record and there are no proper or sufficient Specifications of Error in appellant's brief, within the rules of this Court and the law applicable.

6. That no appeal lies from the order of the lower court denying Motion to Modify Judgment and said order is not an appealable order and such order is a matter entirely and exclusively of the lower court's discretion.

Dated at Billings, Montana, this 29th day of October, 1931.

BROWN, WIGGENHORN & DAVIS

By R. G. Wiggenhorn,

Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—v.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Brief of Appellee

STATEMENT OF THE CASE

The following are deemed material facts, controlling upon this appeal, omitted from Appellant's Statement of the Case or incorrectly stated. They apply equally to the motion to dismiss and to the merits of the appeal. For emphasis we have italicized what the record does *not* contain, because the very statement of these shortcomings seems to bar further consideration of this appeal.

Appellant neither offered, submitted nor requested the court to make a single finding of fact or conclusion of law.

Appellant did not object to any of the proposed findings of fact and conclusions of law requested by appellee.

Appellant did not object to any of the findings of fact and conclusions of law adopted by the court.

Appellant did not except to any of the findings of fact and conclusions of law adopted and made by the court and did not

request that any of the same be modified nor sharply call attention to any alleged errors therein.

The proceedings leading up to the judgment complained of were not preserved by bill of exceptions and no bill of exceptions was settled or appears in the record.

The objections referred to in the court's order adopting Appellee's requested findings and relied upon in Appellant's brief, do not appear in the record, and not being a part of the primary record, could not there appear without bill of exceptions.

The court's order adopting findings therefore served to adopt all the proposed findings without any modification ascertainable and without reduction of any of the principal amounts claimed.

Thus the aggregate of the claims allowed by the court, without interest, is $16,984.43, about $1,000.00 less than the amount of the judgment.

Since the interest upon this amount is over $10,000.00 the court gave judgment for very much less than the findings warrant.

Reference to the testimony shown in the record in the previous cause, No. 5861, shows that the amounts of the various claims sued upon were undisputed by the Surety Company and that the latter offered no testimony in resistance, the only evidence introduced by the Surety Company being the testimony of its counsel, Mr. Wood, upon matters unrelated to the amount of the claims.

Precisely, the record in this cause contains the following, and nothing more:

Appellee's requested findings

Order adopting same

Judgment

Motion to modify judgment

Order denying motion

Appeal papers.

Statements appearing in Appellant's Statement of the Case, are challenged as follows:

The lower court did not base its findings upon the record that came to this Court in cause No. 5861, but rather upon the entire testimony appearing at the trial theretofore had, as preserved in the reporter's transcript of testimony.

The Bill of Exceptions appearing in the Transcript of Record in cause No. 5861 does not contain all of the evidence. (See Petition for Writ of Mandamus)

The omitted testimony could not have been incorporated into the record upon this appeal by counter-praecipe of Appellee or by any means whatsoever, because it was not preserved by bill of exceptions and could not be authenticated except by the amendment of the original Bill of Exceptions contained in the original record (cause No. 5861), thus leaving nothing to be certified up to this Court except the primary record consisting of findings and judgment.

There is nothing in the record to show how the judgment was computed by the court and the statement in Appellant's brief that the court determined the principal amount of all claims allowed by it to be $10870.40 and added interest thereto to make the total amount of the judgment $17,963.72, is not supported by the record. On the contrary the record shows that the principal amount allowed by the court may have been as high as $16,984.43 (Tr. pp. 4-13) which would leave the interest allowed to make up the balance of the judgment, as $979.29.

OUTLINE OF ARGUMENT

ARGUMENT.

1. COURT'S FINDINGS ARE NOT REVIEWABLE EXCEPT FOR LACK OF EVIDENCE TO SUPPORT.

Title 28 U. S. C. A. Sec. 773 provides as follows:

> "Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Under this section of the statutes, as governed by the Seventh Amendment of the Constitution forbidding the re-examination by a court of any fact tried by a jury otherwise than according to the rules of the common law, the federal courts have repeatedly reiterated that in a trial by the court, whether the findings are general or special, it is the exclusive province of the court to determine the facts and that its determination is final and not reviewable.

> Town of Martinton v. Fairbanks, 112 U. S. 670, 28 L. Ed. 862;
>
> Mercantile Ins. Co. v. Folsom, 85 U. S. 237, 21 L. Ed. 827;
>
> Law v. U. S., 266 U. S. 494, 69 L. Ed. 401.

In the last named case there was a general finding for the plaintiff, which was reversed upon appeal to this Court. In reversing this Court, Justice Brandeis said:

> "Neither the evidence nor the questions of law presented by it were reviewable by the court of appeals. To inquire into the facts and the conclusions of law on which the judgment of the lower court rests was not permissible."

The statute found at *28 U. S. C. A. Sec. 879* is also applicable:

> "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error

in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

Under this section a verdict is held conclusive on writ of error as to the amount of damages.

(See innumerable cases cited under note 14)

"That we are without authority to disturb the judgment upon the ground that the damages are excessive, cannot be doubted. Whether the order overruling the motion for new trial based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record."

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. Ed. 605.

While the case of *Slocum v. N .Y. Life Ins. Co., 228 U. S. 364, 57 L. Ed. 879*, involves a trial by jury, it illustrates the length to which the Supreme Court has gone in preserving the inviolability of the jury's verdict. The same immunity from interference by the appellate court applies to the trial court's findings where a jury is waived. In the case referred to, the defendant's motion for a directed verdict and its subsequent motion for judgment notwithstanding the verdict were denied. Upon appeal to the circuit court of appeals the judgment was reversed and judgment ordered entered on the evidence in favor of the defendant. The Supreme Court, in passing thereon, observed that the action of the court of appeals did violence to the Seventh Amendment to the Constitution in assuming to pass upon issues of fact presented by the pleadings. It was further observed that while the Constitution itself conferred upon the Supreme Court appellate jurisdiction both as to law and fact, this was regarded as so endangering the right of trial by jury that the first Congress enacted the Seventh Amendment; that the common law referred to in the Seventh Amendment was the common law of England, not that of the several states, and

according to the common law of England the facts once tried by a jury are never subject to reexamination unless upon a new trial; that the conclusion follows that the court of appeals could not itself determine the facts upon reversal but, the verdict being set aside, there arose the same right of trial by jury as in the first instance; that the court of appeals here determined the facts without a new trial and thus assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury; that this notwithstanding that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff. The court further called attention to the fact that under the common law the plaintiff could not be nonsuited without his consent, and that there could be no such thing as a compulsory non-suit, but only a voluntary non-suit, a compulsory non-suit operating only as an arrest of the trial and dismissal of the cause leaving the merits undetermined.

As illustrating the same rule as applied to the disposition of a case upon an agreed statement of facts, see also *New York Life Ins. Co. v. Anderson, 263 Fed. 527.*

See also 25 C. J. 972.

2. APPELLANT HAVING REQUESTED NO FINDINGS NOR EXCEPTED TO FINDINGS MADE, PRESENTS NOTHING FOR REVIEW.

The statute found in *Title 28, U. S. C. A. Sec. 875* reads as follows:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The general proposition that upon appeal the evidence cannot be reviewed to ascertain whether it supports a finding of fact unless the question of law has been fairly presented to the trial court by appropriate request and exception, has been so repeatedly announced by the federal courts that it seems needless to cite authority.

> "When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, 'for any error of fact' (Rev. St. Sec. 1011, U. S. Comp. St. 1913, sec. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact. The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. . . . For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the

specific error alleged, is indispensable to the review of such a ruling."

Wear v. Imperial Window Glass Co., 224 Fed. 60.

In *U. S. v. A. T. & S. F. Ry. Co. 270 Fed. 1*, after reciting the above quotation, the court said:

"In this case no request or motion was made to the court below, nor was any similar action had to present to that court the question of law whether or not there was any substantial evidence to support a judgment or finding for the defendant, nor was any ruling made on that issue or exception to the ruling taken before the trial closed.

. . . . . .

"Again, the trial ended in this case when, after full hearing and submission of the issues of fact and law on January 24, 1919, the court, after consideration on January 28, 1919, filed its findings of fact and its conclusions that judgment must be entered for the defendant. After that filing it was too late to take exceptions to rulings of the court on the issues tried, and no requests for findings or for modifications of findings were made by the plaintiff until subsequent to the close of the trial. Such subsequent requests and rulings thereon are, like motions for new trials after verdicts and the rulings thereon, discretionary with the trial court, and are not subject to review in the federal appellate courts." (citing authorities)

So in *McFarland v. Central Nat. Bank, 26 Fed. (2d) 890, 892:*

"There was a motion for a new trial, a statement of alleged errors among the proceedings under this motion and a denial of the motion; but neither that denial nor any of those proceedings are reviewable by this court for they are not a part of the bill of exceptions which contains the record of the trial which alone we are at liberty to consider. The decision of a motion for a new trial is not reviewable in the federal appellate courts. The bill of exceptions contains no record of any request on the part of the defendants during the trial for any findings of fact or declaration of law, or any exception to any declaration of law made by the court. In this state of the record the general judgment for the plaintiff is a conclusive finding by the court of all facts requisite to sustain it."

In *Pederson v. U. S., 253 Fed. 622,* a decision from this circuit, Judge Hunt, in speaking for this court, said:

> "From the foregoing history of the case it is apparent that, trial of the issues having been to the court without a jury, and no request having been made of the trial court for a ruling that there was no substantial evidence to justify judgment, the findings upon questions of fact should be accepted by this court, and therefore the only rulings for review are those made upon matters of law properly presented by bill of exceptions."

In the case of *Humphreys v. Third Nat. Bank, 75 Fed. 852,* Judge Taft, while circuit judge, provided the profession with a lucid exposition of the essentials for preserving a record for review in a trial to the court, explaining the necessity both for a request for findings and exceptions thereto and the reasons for requiring strict adherence to the rules:

> "When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity

> is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special findings of fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes."

Where at the close of the trial court's findings of fact and conclusions of law the following language appeared:

> "An exception will be allowed each of the parties to each finding and conclusion or part thereof not proposed by such party.
>
> "An exception will also be allowed to each of the parties to the refusal or failure of the court to adopt any finding or conclusion proposed by such party.",

the court of appeals for the eighth circuit disposed of the matter as follows:

> "The first clause amounts to nothing as a mere exception presents no ruling of the court for review, and if it did a finding of fact is not subject to review on writ of error. Rev. Stat. Sec. 1011 (Comp. St. sec. 1672); Atchison, Topeka & Santa Fe. Ry. v. U. S. (C.C.A.) 270 Fed. 1.
>
> "The second clause amounts to nothing for the reason stated in connection with the first clause, and for the further reason that the record does not show that either party proposed findings of fact or conclusions of law. The sufficiency of the evidence is therefore not before us, and there is no assignment of error that the facts found do not support the judgment. See sections 649, 700, of Rev. Stat. (Comp. St. Secs. 1587, 1668.)"
>
> Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co., 283 Fed. 915, 920.

It has in fact been held by the Supreme Court of the United

States, where the trial judge had filed its opinion and entered its judgment without notice to the parties and thereafter settled a bill of exceptions reciting exceptions to the rulings, findings of fact and conclusions of law and stating that the exceptions were "to be taken as severally made at the time thereof, and before the entry of judgment thereon," that such exceptions were not taken "in the progress of the trial," and the bill of exceptions cannot be considered; that to obtain a review of the conclusions of law a party must either obtain special findings which raise the legal proposition or present the proporitions of law to the court and obtain a ruling thereon; that is, he should request special findings of fact and then reserve his exceptions thereto if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law he should have them separately stated and excepted to. The court said:

> "In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits."
>
> Fleischmann Con. Co. v. U. S., 270 U. S. 349, 70 L. Ed. 624.

In *Thompson-Starrett Co. v. LaBelle Iron Works, 17 Fed. (2d) 536,* while the court condemned as needless the practice of requiring a ruling from the court that a specific finding has no evidence to support it, there was no relaxation of the strict requirements of the rule requiring an exception to a finding in order to review the question whether there is any evidence to support it. Exceptions to the report of a referee were held not to be exceptions to the rulings of the court "in the progress of the trial," and likewise as to exceptions taken to the ruling of the court confirming the referee's report, which were held to be taken after judgment and therefore not within the statute.

We quote from the syllabus in *Texas Co. v. Brilliant Mfg Co., 2 Fed. (2nd) 1.*

> "No point will be considered by an appellate court unless objections are made and exceptions taken to the ruling thereon during the trial and the exceptions embodied in a formal bill and presented to the judge for allowance at the same term or within a further time allowed by the order, entered at that term or by a standing rule of court."

There is in this record not a suggestion that any exceptions were taken. This is obviously and necessarily so, since no bill of exceptions was settled. Nor does it appear that Appellant objected to the court's findings or any ruling "in the progress of the trial." It is true that the order of the court adopting Appellee's requested findings refers to "objections by defendant" (Appellant) but these objections do not appear in the record and of necessity could not there appear without bill of exceptions and we are therefore left in ignorance as to what these objections were or what they were directed to. Even if these objections were before this Court and the Court were advised of them, the alleged error complained of and objected to would be considered waived in the absence of an exception.

3 C. J. 895-897.

> "The proper method of attacking the lack or insufficiency of findings and conclusions, and the failure of the court to correct the same upon request, is by objecting and excepting to the error at the time of the decision, . . . and no review of such lack or insufficiency can be had unless objection is made thereto in the trial court, and exceptions taken."

38 Cyc. 1990.

> "As a general rule, when there is a trial by the court without a jury, the findings of fact are conclusive, and are not subject to review as erroneous or defective in the

absence of proper exceptions thereto. Therefore, in the absence of proper exceptions, the reviewing court will not consider whether the findings are sufficiently specific or not, or whether they are supported by the evidence:"

3 C. J. 933.

So also is it held that the court's conclusions of law require exceptions in order to review them.

3 C. J. 937.

Humphreys v. Cincinnati Third Nat. Bank 75 Fed. 852.

3. UPON RECORD AS PRESENTED, WITHOUT BILL OF EXCEPTIONS, COURT IS LIMITED TO INQUIRY WHETHER FINDINGS SUPPORT JUDGMENT.

The above statement follows as an inevitable conclusion from what has already been said. The findings themselves become fixed and established as admitted facts in the case. A reference to the testimony becomes neither necessary nor permissible. Thus there remains nothing but to examine the findings themselves.

In the absence of any criticism by Appellant of the findings, we will not burden the Court with an analysis. Far from attacking the findings as being insufficient to support the judgment, Appellant's brief, on the contrary, is devoted entirely to a condemnation of the findings themselves. In other words the trial court is charged with having found too much rather than too little.

Nor would the assignment of errors permit an attack upon the sufficiency of the findings, no such error having been assigned.

4. IN ADOPTING APPELLEE'S REQUESTED FINDINGS, COURT'S ORDER DOES NOT DISCLOSE IN WHAT RESPECT THEY WERE MODIFIED, WITH THE EFFECT OF THEIR BEING ADOPTED IN TOTO.

More need hardly be said upon this point. This Court having no objections (referred to in the trial court's order) before it, the trial court's order adopting Appellee's requested findings becomes unintelligible in its reference to the objections and, for the purposes of this review, leaves the order stripped of any reference to objections and gives it the effect of adopting the requested findings without reservation.

Looking then to the findings, we extract the following figures:

Claimant	*Amount Allowed*	*Finding No.*
W. H. Queenan	$ 1737.62	10
J. J. Fallman	$ 2027.00	11
C. F. Wickliff	$ 3087.00	12
John I. Kunkle	$ 850.00	13
Dave C. Yegen	$ 1324.00	14
B. J. Martin	$ 6753.32	15
B. J. Martin	$ 643.19	16
B. A. Kurk	$ 562.30	9½
Total	$16984.43	

The above figures are principal amounts, and it will appear that the judgment exceeds the total of these amounts by $979.29. However the findings allow interest upon all of the amounts, the total amount of which would exceed $10,000.00.

Thus the matter exclusively discussed in Appellant's brief and

for which error alone is assigned, viz, the matter of interest, involves only the sum of $979.29.

This is mentioned here only to clarify the situation and simplify the issue, and not in any sense as an admission that the findings can be reviewed or, if so, that the interest was not properly allowed. The purpose rather is to show that the statement appearing in Appellant's brief (p. 6) that the principal amount allowed by the trial court was $10,870.40 and the amount of interest allowed was $7093.22, is wholly unwarranted, upon the record, regardless of what the intention of the trial court may have been. Upon the record the total sum of all the claims allowed in the findings with the interest thereon is over $27,000.00. The judgment is nearly $10,000.00 less than this sum. In the state of the record, what portion of the judgment is principal and what portion interest, cannot be ascertained, but since every intendment in its favor must be indulged in, if, in any event, the allowance of any interest is condemned, the judgment must be supported in the largest amount of principal which the findings will warrant. This, as we have said, would be in the sum of $16,984.43.

Before we discuss the legal question of the allowance of interest, let it be said that, the interest having been allowed in the findings, the question of whether the evidence supports such findings is foreclosed by Appellant's failure to request contrary findings, object to the requested findings and except to the findings made and the rulings thereon.

5. THE BILL OF EXCEPTIONS IN CAUSE NO. 5861 CANNOT BE CONSIDERED UPON THIS APPEAL.

There is on file a petition for writ of mandamus to compel the trial court to insert in the bill of exceptions in cause No. 5861 the omitted portions of the proceedings at the trial, if that bill of exceptions is to be considered by this Court. If it is necessary to explain our position in that regard, we do not mean thereby to confess that the bill of exceptions in the record of that cause can be here considered, but we have requested that relief by our petition merely in an abundance of caution to avoid manifest injustice. The very shortcomings of the bill of exceptions referred to, justified by the rules of this Court, is the best argument to demonstrate the ineffectiveness and inapplicability of that bill of exceptions. The appellant who seeks a review of error complained of should himself present the record of that error, with all of the matter involved in a consideration thereof incorporated therein; and to present in its place a record made up by his adversary upon another occasion and upon another appeal and for the purpose of presenting error of an entirely different sort and with such matter incorporated therein only as is necessary for a fair consideration of such previous error, is not only ineffectual but would serve to reward appellant for his lack of diligence. Certainly it could not serve to bring before the reviewing court all of the matters involved in the decision complained of by appellant.

We have encountered difficulty in finding a case the facts of which present this exact situation. It is enough to say, however, that we have been unable to find any case which justifies the consideration of such a previous bill of exceptions under the circumstances here, and Appellant's brief cites none. How-

ever a study of the character, scope and history of bills of exception and their function, furnishes sufficient support for our position. In Bouvier's Dictionary, a bill of exceptions is defined as follows:

> "A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified to the judge or court who made the decision."

In *Linn v. United States, 251 Fed. 476, at page 483, after* quoting the above definition, the court condemned the bill of exceptions under consideration in the following language:

> "We have been presented with a copy of the stenographer's minutes, which contains all the evidence, the colloquies of counsel with each other, as well as their arguments to the court, all the remarks of the court, and in fact everything that was said and done at the trial, except the arguments of counsel before the jury. It includes the argument addressed to the court upon the motion for a new trial. At the end of everything we find the following:
>
> 'The within bill of exceptions and case, from page 1 to 861, is hereby settled and allowed.'
>
> which is signed by the District Judge. This is not a true bill of exceptions which ought not to contain all the evidence, but only so much of it as is necessary for the presentation and decision of questions saved for review."

In *Buessel v. U. S. 258 Fed. 811, at page 816,* a bill of exceptions is defined as a formal statement in writing of the exceptions duly taken at the trial to the decisions and instructions of the judge, with so much of the testimony as is necessary to enable the court to say whether error of law was committed in respect to the particular decisions or instructions to which the exceptions were taken.

> "The office or purpose of a bill of exceptions is to preserve in, and make a part of, the record such matters as transpire in the progress of a trial, which otherwise would

> not become a part thereof. It must, however, be confined to some particular point or question to which exception was taken pending the trial, and can present only matters of law. It cannot be used to bring up the whole case.
>
> 4 C. J. 217.
>
> "Under the old practice, each exception taken on the trial was written out and authenticated as a separate instrument, called a special bill of exceptions. This seems to be permissible still in some jurisdictions, although under modern practice, the mode generally adopted is to include all the exceptions taken on the trial in one bill called a general bill, . . . "
>
> 4 C. J. 223.

In *James v. Clement, 211 Fed. 972,* it appears that the bill of exceptions was composed in large part of a reference to the evidence contained in a bill of exceptions taken when the case was brought to the appellate court on error on a former appeal; and it was held that this mode of procedure did not bring all the evidence properly before the appellate court.

Considering the true purpose and function of a bill of exceptions—that it is after all not a transcript of the evidence—it becomes at once apparent that a bill of exceptions taken to preserve the record on a prescribed legal question upon a former appeal, cannot be availed of to review a question of law subsequently arising upon a second appeal. Particularly is this so where the party resorting to the bill of exceptions upon the second appeal was not the one who prepared it.

6. AN APPEAL DOES NOT LIE FROM AN ORDER DENYING MOTION TO MODIFY JUDGMENT.

Under the provisions of Section 128 of the Judicial Code (28 U. S. C. A. Sec. 225) the appellate jurisdiction of the circuit court to review is limited to final decisions".

The term "final decision" has been uniformly construed to mean the same thing as a final decree or judgment.

In re Tiffany, 252 U. S. 32, 64 L. Ed. 443,

Brush Electric Co. v. Electric Imp. Co.,

51 Fed. 557.

We submit the order appealed from is not such decree or judgment. Furthermore an order to modify a judgment is discretionary and under no circumstances is it given of right to the movant. There is indeed here a serious question whether it was within the power of the trial court to grant the motion to amend for the purposes desired, there being no claim that this was inadvertent error, but this being a matter which was completely before the court at the time findings were requested and subsequently adopted. To grant such a motion would permit virtually a second trial or a new trial. The best that can be said however is that the matter is one for the discretion of the trial court.

> "It is well settled that the Circuit Court of Appeals has no power to review the action of a trial court as to matters within the latter's discretion, unless it appears there has been an abuse of discretion."

5 Hughes Federal Practice, Sec. 2900.

Thus it is held that the ruling of a federal court on a motion for new trial is discretionary, as is an application to set aside a default judgment, and these matters are not reviewable.

8 Hughes Federal Practice Sec. 5581.

So also the action of a trial court in refusing to set aside a verdict and grant a new trial is not subject to review.

8 Hughes Federal Practice Sec. 5588.

7. INTEREST WAS PROPERLY ALLOWED UNDER THE EVIDENCE.

(a) Writ of Mandamus Should Be Granted to Amend Bill of Exceptions.

As has been previously intimated, we ask the amendment of the bill of exceptions in cause No. 5861, and the consideration of the omitted portions of the proceedings at the trial, only in the event that the obstacles to the consideration of this appeal, presented in this brief up to this point, are not deemed controlling. Likewise what is to be said from this point is intended for consideration only in that event.

We confess that the rule generally is that after the expiration of the term, the court may not amend its bill of exceptions. It will be found, however, that in none of the cases is such a situation as this one presented, which again is explained by the unprecedented attempt here to use the adversary's bill of exceptions upon a former appeal. We have found no case where the court has denied the right to amend the bill of exceptions under the unusual circumstances here, where the amendment is commanded to prevent a miscarriage of justice and to prevent taking advantage of the Appellee.

In *2 Ruling Case Law, p. 150* it is stated that the trial court may amend a bill of exceptions *nunc pro tunc* after the expiration of the term so as to include matters inadvertently omitted where the original bill as filed purports to contain the matters included in the bill as amended, even though the attorney requesting the amendment was responsible for the omission; and when the amendment is made after the transcript has been filed in the appellate court, the record may be corrected in the latter court by a suggestion of its diminution and by certiorari.

See also to the same effect *4 C. J. 314 to 323.*

We have deemed certiorari inappropriate because the omitted portions of the proceedings at the trial are not incorporated in any bill of exceptions and it was too late to settle one and because the clerk would therefore be powerless to certify up such proceedings. Therefore the only method suggested was the one adopted.

The omitted portions of the proceedings at the trial are found and incorporated in "Exhibit A" attached to the petition for writ of mandamus, being copy of the motion addressed to the trial court to amend the bill. The reason for the trial court's refusal to grant the motion, and the trial court's unqualified confirmation of the omitted portion of the proceeding as being correct and of importance in consideration of the matters involved, is found in "Exhibit B" attached to the petition for writ of mandamus, viz. the order denying the motion to amend. The petition for writ of mandamus contains a recital of the facts and events which explain the omissions from the bill of exceptions and the erroneous certificate thereto, and the supporting points and authorities are appended thereto. Reference is hereby made to the petition for writ of mandamus and the exhibits attached thereto.

(b) Under Local Law Recovery of Interest Upon the Claims Here Established is Warranted.

It is admitted that the claim pleaded on behalf of B. J. Martin is pleaded in quantum meruit. All the other claims are pleaded in identical language and we do not consider them pleaded in quantum meruit but upon contract. However, no point is made of that, as we do not believe that cataloguing the

claim either as one in quantum meruit or otherwise determines the question of interest, as will be shown by the authorities following.

Subdivision 2 of Appellant's brief is devoted to an effort to establish all of these claims as pleaded and proven in quantum meruit. If the argument here found is correct, then it would seem that the pleader settles for himself the question whether he will or will not be allowed interest by the pigeon-hole into which he fits his complaint. If it is upon contract or for damages for breach of contract, he gets interest; otherwise not.

Turning now to the testimony and proceedings at the trial. It is here that the omitted portions of the proceedings become relevant and attention is directed to them. The proceedings will be set out rather at length because we believe they furnish their own best argument.

Looking first to the Transcript of Record in cause No. 5861, the testimony of the witness Queenan, page 153 of the transcript and following, the question was asked:

> "Do you also know, Mr. Queenan, what the going and ordinary price or value, at the time this work was done, of the four-horse team with driver, and Fresno was per day?
>
> "Mr. Wood: That is objected to as entirely irrelevant and immaterial, it appearing that this man was under an express written contract with Schlueter Brothers, which fixed the price per yard for the various classes of material moved and the compensation paid when the work was completed. And it is further objected to as incompetent under the pleadings, and particularly under the bond—declared as the basis for the claim of the plaintiff."

It appears that subsequent testimony was admitted subject to objection (Tr. 154). All of this subsequent testimony had to do with reasonable value.

Attention is now directed to the first proposed amendment covered by our petition for mandamus, found at pages 3 and 4 of Exhibit A attached to the petition. The omitted matter there referred to follows at the end of the first sentence of counsel's objection, found at the bottom of page 153 of the transcript. Inserting it here so that it may be pieced together, we quote:

> "Mr. Wiggenhorn: Our position in the matter is that this contract, which of course is as counsel says, having been breached by the other party it is optional with the party not in the wrong to either recover upon a quantum meruit for the reasonable value of the services or upon the contract itself, he may either sue for damages for breach of contract, sue for specific performance, that is stand on the right to perform and go on through, or he may recover for the reasonable value of the services. I understand that is fundamental law and I do not think it is necessary to go into the supporting authorities, except to say this: There might be some little question, it is true, as to whether both can be proved. My position in the matter is, and I think it is supported by the authorities, so far as the proof is concerned, they may both be offered in proof and the Court may find as the case may warrant.
>
> "By the Court: I do not see how it could be shown, as he is attempting to recover upon the bond given by Schlueter Brothers, why he would not be governed by the contract. I will let him state. You may go into it briefly and I will pass on it later.
>
> "Mr. Wood: Exception.
>
> "Q. I want to know the going value or price at this time in reference to work done, for a four-horse team with Fresno, and man?
>
> "Mr. Wood: In addition to the objection, the testimony is irrelevant and we object as incompetent under the pleadings, and particularly under the bond declared as the basis for the claim of the plaintiff.
>
> "By the Court: In my present state of mind I am inclined to agree with counsel, but I don't know—not know-

ing all the facts, I will allow him to make his proof. Make it as brief as possible.

"Mr. Wood: Exception."

It would unduly extend this brief to quote all of the remainder of the omitted portions. To illustrate, it will be sufficient to quote the remarks of counsel in interposing an objection, which is found on page 4 of "Exhibit A" attached to the Petition for Writ of Mandamus:

> "Before counsel interposes any further questions, and questions the witness further along this line, I desire to object to evidence of this character, and also move to strike from the record all the testimony of the witness in reference to the services performed by men and teams on force account or reasonable value of services, upon the ground that there is no basis in the pleadings for such a claim. That the testimony is incompetent under the pleadings, and that the pleadings clearly declare upon the sub-contract made with Schlueter Brothers; consequently unless proof is made accordingly, it is not competent."

It is enough to add that at the trial, in the light of the objections and the court's ruling thereon, plaintiff abandoned further effort to prove reasonable value or recover on force account and contented itself with the contract price. (See omitted proceedings, "Exhibit A" attached to Petition for Mandamus) An examination of the testimony of the witness Queenan (Tr. pp. 151-155) will disclose that had recovery been allowed upon force account, or quantum meruit, he would be entitled to about $3,000.00 net. While no further effort was made, after the ruling of the court, to show the going price of men and teams, it will be observed that based upon the size of outfit and period of time worked, Wickliff would have recovered a still larger amount in proportion to the amount actually shown by him. (Tr. 157) And so likewise as to some of the others.

Without further comment, it is enough to observe that Appellant now condemns the pleading and proof as supporting only quantum meruit where, at the trial, its counsel successfully excluded testimony supporting a quantum meruit on the ground that the pleading would support a recovery only upon the contract. What was then successfully urged as a pleading upon quantum meruit, now becomes a pleading upon the contract, and where the effort of the Irrigation District to abandon the contract and sue for the reasonable value of the services, upon objection of the Surety Company, was denied and the Irrigation District was limited to strict proof upon the contract and the contract price, the Surety Company now about-faces and brands the proof which it successfully limited to the contract and the contract price, as evidence upon a quantum meruit alone.

Whatever merit there may be in Appellant's argument in subdivision 2 of its brief, it is bound by the theory it adopted at the trial. It cannot blow both hot and cold. It is not to be wondered at that Appellant has not settled a bill of exceptions of its own on this appeal and has resisted all efforts to present the complete proceedings.

Turning now to the Montana statutes and Montana decisions bearing upon the recovery of interest. The statutes are quoted in full at page 23 of Appellant's brief. For emphasis, we repeat Section 8662:

> "Every person who is entitled to recover damages certain, or *capable of being made certain by calculation*, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. . . . " (The italics are ours.)

First, let us dispose of the case of *Palmer v. Murray, 8 Mont.*

312, 21 Pac. 126, cited in Appellant's brief. That case was decided in 1889. It essays to construe and interpret Sections 1236 and 1237 of the old 1887 Compiled Statutes. Those sections embody substantially what is now found in our present Section 7725. The present Section 8662, quoted above and relied upon by us, was first found in the 1895 Montana Codes. Under the statutes in force at the time the Palmer case was decided there was no such provision as is found in our present Section 8662. The Palmer decision was based upon the proposition that interest is a creature of statute and that since the law-making power in Montana has undertaken to say in what cases interest should be allowed, interest can be allowed only in such cases. It was particularly pointed out therein that the statute regulates interest in a variety of cases *except those for damages or unliquidated claims.* In fact the case goes so far as to say that "interest is not to be allowed on any demands except from the day on which the exact amount due is ascertained."

Before going further, let it be understood that we are in complete accord with Subdivision I of Appellant's brief to the effect that Montana statutes and decisions control.

However, the Palmer case will not throw any light upon Montana law. Since the enactment of our present statute, Section 8662, there have been other pronouncements from the Montana Supreme Court. In *Hefferlin v. Karlman, 29 Mont. 139, 74 Pac. 201,* the action was to recover upon an open account for goods, wares and merchandise, an ordinary store account. The jury was instructed that if they found the goods were sold and delivered they should find for the plaintiffs for the value thereof "and allow interest thereon at the rate of eight per cent per annum from" the date of the purchase. The correctness of this

instruction was one of the grounds of appeal. It was held that Section 8662 applied to the open account sued upon and the allowance of interest was justified.

In Appellant's brief at page 29 an effort is made to distinguish the pleading in the Hefferlin case from the pleading in the case at bar. Laying the two pleadings side by side, and the extremity to which counsel is driven becomes apparent in the effort to distinguish and call the Hefferlin pleading as one upon contract and the pleading here as in quantum meruit. In the Hefferlin case the complaint alleges that:

> "Plaintiffs sold and delivered to the defendants, at their request, goods, wares and merchandise amounting to, and of the value of $1679.74, which sum the defendants agreed to pay plaintiffs, and that no part thereof has been paid."

In the case at bar, as applied to all claims except the Martin claim, the pleading is identical, as follows:

> "That under such a subcontract (referring to the contract of employment between claimant and Schlueter Brothers) Yegen . . ., at the special instance and request of said Schlueter Brothers did and performed work, labor and services for said Schlueter Brothers . . .which were of the reasonable value of $1324.00 and which was also the agreed price therefor and which said Schlueter Brothers contracted and agreed to pay." (Tr. No. 5861 pp. 8-12)

Both allegations show that the work was done or the merchandise furnished *at the request* of the defendants. Both allege the work or merchandise respectively was of a certain value, the word reasonable being inserted in the case at bar. Both state that defendants agreed to pay. There is not a single element in the Hefferlin case which it is claimed takes it out of quantum meruit that is not found in the case at bar, and there is not a single element found in the case at bar which it is claimed brands it as quantum meruit which is not found in the Hefferlin

pleading. On the contrary in the case at bar the pleading contains additional allegations not found in the Hefferlin pleading which clearly distinguishes it as upon contract, for in the case at bar it is alleged that the work was done under a contract, the agreed price is pleaded, and at the close thereof it is again specifically stated that Schlueter Brothers *contracted* to pay the stated amount. Add to this the fact that in the Hefferlin case it appears clearly from the evidence that the suit was for merchandise sold in a store in the ordinary course of business, not upon an agreed price, but as butter and eggs are ordinarily sold; while in the case at bar the evidence clearly discloses that the work was done upon a written contract upon a unit price, and that appellant's, by their own choice, limited the evidence and recovery to that contract price. (See proceedings omitted from bill of exceptions)

In *Leggat v. Gerrick, 35 Mont. 91, 88 Pac. 788,* the suit was "to recover a balance of One Hundred Dollars for professional services" rendered by a doctor. One of the questions presented on appeal was whether the court erred in allowing interest upon the amount recovered. As to this the court said:

> "We do not think that the trial court erred in allowing interest on the amount recovered. Its action appears to be warranted by section 4280 (present section 8662) of the Civil Code, (here follows the entire section quoted)— and by the construction given to that section by this court in Hefferlin v. Karlman, 29 Mont. 139, 74 Pac. 201."

The case of *Clifton-Applegate-Toole v. Drain Dist. No. 1, 82 Mont. 312, 267 Pac. 207,* cited in Appellant's brief, while not aiding us here, certainly furnishes no support for Appellant's contention. Interest was allowed there.

These cases fix the rule obtaining in Montana and they fur-

nish the rule for the guidance of the trial court here. Whatever the rule may be elsewhere, the rule is clear here.

In this connection attention may also be directed to *Section 8663* of the *Montana Codes* which provides as follows:

> "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

Under this section interest has been awarded under a variety of circumstances, such as damages to personal property, livestock killed by a railroad, damages caused to property by the grading of a street.

Wright v. City of Butte, 64 Mont. 363, 210 Pac. 78.

Phelps v. Gt. Nor. Ry. Co., 66 Mont. 198, 213 Pac. 610.

Dewell v. N. P. Ry. Co., 54 Mont. 350, 170 Pac. 752.

Ball Ranch Co. v. Hendrickson, 50 Mont. 220, 232, 146 Pac. 278.

Caledonia Ins. Co. v. N. P. Ry. Co., 32 Mont. 46, 48, 79 Pac. 544.

In the recent case of *Daly v. Swift & Co.*, not yet reported in Montana but found in *300 Pac. 265*, the Montana Supreme Court, at page 269, in denying the allowance of interest upon a personal injury claim, said:

> "The justification for computing interest on a sum ascertained to be due from a defendant to a plaintiff, whether on contract or as damages, is that the defendant has withheld that which should have been paid on a day certain and thus deprived the plaintiff, not only of the principal sum, but of the interest which it would have earned during the period of its withholding; therefore interest should only be recoverable when the amount which will discharge defendant's liability is ascertained or is ascertainable, so that payment or tender could have been made at the time it should have been made. This condition exists as to those cases where damages are sought for injury to, or

> destruction of, property, but does not exist in cases of personal injury where the damage done is not susceptible of definite or accurate computation."

The court also quoted with approval from the Georgia case of *Western etc. Ry. Co. v. Young, 7 S. E. 912,* as follows:

> "To add interest to discretionary damages is to multiply uncertainty by certainty; the indefinite by the definite; a mixture of incongruous elements which subjects one of the parties to the burden, and gives the other the benefit of both kinds. If the time of realizing discretionary damages is to be considered (and doubtless the jury may consider it), it should be left as one of the terms of the general problem of damages, unfixed like all the rest of the terms."

The three Montana cases cited in Appellant's brief which were on a quantum meruit, afford no aid to the Court. As is admitted in Appellant's brief, no interest was asked for, and it may be added that the question of interest was neither involved nor mentioned in any of the opinions. We are concerned here only with cases which have passed upon or considered the question. Certainly we are not controlled by the individual views of other counsel. With respect to the California cases cited in Appellant's brief, we submit that they do not in any way reflect upon the rule obtaining in Montana. Aside from the fact that, as indicated, Montana has clearly put itself on record and announced the rule for itself, the construction of the statute by the California court does not satisfy the federal rule of interpretation that Montana statutes and decisions shall control. Even if there were no Montana decisions construing this statute, we do not think that the California decisions could supply their place. Furthermore, it is not the construction placed upon the statutes by California, generally, that interests the Montana court, but only the construction placed upon the statute of California *before* its adoption in Montana.

State ex rel. Rankin v. State Board, 59 Mont. 557, 197 Pac. 988.

Haydon v. Normandin, 55 Mont. 539, 179 Pac. 460.

In this connection also, we quote from the case of *A. O. H. v. Sparrow, 29 Mont. 132, 135, 74 Pac. 197*, as follows:

> "However, this court will not blindly follow the construction given a particular statute by the court of a state from which we borrowed it, when the decision does not appeal to us as founded on right reasoning."

See also *Esterly v. Broadway Garage Co., 87 Mont. 64, 285 Pac. 172.*

Furthermore, an examination of the quotations from the California cases appearing in Appellant's brief discloses that they do not entirely support Appellant. From the quotation appearing at page 25 of Appellant's brief, from the cases of *Farnham et al. v. California Safe Deposit & Trust Co., 96 Pac. 788*, it appears that a number of claims were involved and interest was allowed upon all of them except one. Thus interest was allowed where the services were at a fixed rate per day, and again interest was allowed for materials sold at the market prices. The first class of cases would include all of the claims in the case at bar except Martin's, and the second class is the same as Martin's claim. Regardless of the fact that the Martin claim is upon quantum meruit so far as the pleading is concerned, examination of the testimony will show that the items thereof were for money actually expended by him for labor and material at established market prices. All of the other claims were upon a unit contract price. All amounts of the claims were capable of being made certain, under the statute. We invite attention also to the quotation on pages 26 and 27 of Appellant's brief.

In this connection it is important also to note that there is

abundant proof that the claims were capable of being made certain and that they were in fact undisputed, in the fact that not a word of testimony was offered by the Surety Company upon the amount of the claims, but the testimony of the plaintiff was accepted by the Surety Company without refutation. The Surety Company offered no evidence thereon (Tr. Cause No. 5861, pp. 176-186).

The effort of Appellant's brief throughout is to brand these claims as in quantum meruit and by the citation of abstract authority, to demonstrate that interest is not recoverable. However, the process of determining whether interest is allowable is not one of legerdemain, nor is it a mathematical formula or geometrical demonstration. Rather is it based upon reason and fundamental principles.

> "By modern decisions, interest is allowed as compensation for the use of money on the ground of some contract, express or implied, to pay it, or as damages for the breach of some contract, or as damages for the violation of some duty, in all cases where it is possible to assess such damages in a definite and liquidated sum."
>
> 15 R. C. L. 6.

> "While, as a general rule, interest is not allowable on unliquidated demands, yet it has frequently been held that interest may be allowed as damages even in the case of unliquidated demands, where the latter are capable of ascertainment by calculation or where they may be determined by reference to well established market values, together with computation."
>
> 15 R. C. L. 7.

> "From what has been seen of the origin and history of interest, it is obvious that at common law there were no circumstances under which interest could be claimed as a matter of right. From the modern viewpoint, however, there are many circumstances when interest, as has been

said, 'goes with the principal as the fruit with the tree'; and interest has often been held to be recoverable as of right in cases of bonds, written contracts for the payment of money on a day certain such as bills of exchange or promissory notes, or on a contract express or implied for the payment of interest, or where the money claimed has actually been used or is improperly retained by the defendant. According to this modern view, *whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him;* and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. Even where the amount of debt can be ascertained only by inquiry as to the value of the property or services it has been held that this should be done and interest allowed. The English rule is otherwise, but in this country the courts have for many years been tending to the conclusion that a man who breaks his contract to pay a debt, whether the payment was to be made in money, or in anything else, shall indemnify the creditor, so far as that can be done, by adding interest to the amount of damages which was sustained on the day of breach." (Italics ours)

15 R. C. L. 10-11.

It should be remembered that, after all, the action here is upon a written contract, the Surety Company's bond. Thereby it promised to pay and it could have discharged its liability and relieved itself of interest, at any time.

There is abundance of authority from other jurisdictions sustaining the recovery of interest upon similar bonds under similar states of fact.

In *Robinson v. U. S., 251 Fed. 461*, the suit was on a similar bond as is before us, to recover for labor and material claims, brought by the United States on behalf of the claimants. Interest

was allowed upon some of the claims and disallowed on others. The action having been brought in New York, the court announced that New York decisions would be followed and quoted from *Faber v. City of New York, 222 N. Y. 255, 118 N. E. 609* as follows:

> "The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that, if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquidated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter have determined what was due, either by computations alone, or by computation in connection with established market values, or other generally recognized standards?"

In allowing interest, each claim was considered separately. Thus interest was allowed upon a claim by a sub-contractor where the work done by him had been allowed by the government and paid to the contractor, notwithstanding that the claimant claimed a greater amount. It was pointed out that these items were payable to the sub-contractor and although he claimed more, the contractor might have tendered the correct amount finally allowed by the court and left the balance for further controversy. Likewise interest was allowed upon the same basis upon a claim where there were reciprocal demands and the contractor had credits claimed and coming, interest being allowed upon the theory that the amount was susceptible of computation, notwithstanding that there was a dispute as to a part of the claim which again it was held could have been left to further controversy after the contractor had paid the amount found correct by the court.

The case of *Faber v. City of N. Y., 222 N. Y. 255, 118 N. E. 609*, quoted from in the Robinson case above, furnishes a good illustration of what claims are not considered capable of being made certain. There the plaintiff was a contractor who had undertaken to build a certain pier of the bridge across the East River in New York. By reason of an error occurring in the engineer's calculations he was compelled to excavate, in caissons, under water, a large quantity of rock work at tremendous expense for which he was seeking to recover as damages, being in excess of the terms of the contract. Interest was not allowed upon the recovery because this rock work was not priced in the contract and had no market value because of its unusual character and the unusual conditions under which the work had to be done.

In the California case of *Farnham v. Cal. S. D. & T. Co., 96 Pac. 788, 791,* in a foreclosure of mechanic's liens, interest was allowed upon some of the claims and disallowed upon others. Upon claims where the services rendered were at fixed rates per day or the materials were furnished at market prices interest was allowed.

In *Pederson v. U. S., 253 Fed. 622*, a case from the Ninth Circuit arising in Washington, upon a bond similar to the one before us, materialmen were allowed to recover interest upon claims similar to the claims here from the time the demand accrued, the amount being held ascertainable by computation. Likewise the allowance of interest was justified against the surety because it appears the claims against the principal bore interest.

Cases which support the recovery of interest against the surety where the principal is liable to interest are:

State v. Surety Company (Ida.) 152 Pac. 189, 193.

Union Indemnity Co. v. State (Ala.) 127 So. 204.

Fidelity & Dep. Co. v. U. S., 229 Fed. 127.

Montpelier v. National Surety Co., 122 Atl. 484.

On the other hand there are many cases which support the recovery of interest upon the principal amount of the bond notwithstanding that the amount thus recovered for principal and interest exceeds the penalty of the bond. Thus in *McPhee v. U. S., (Colo.) 174 Pac. 808, 813,* the court quoted from *Wyman v. Robinson, (Me.) 40 Am. Rep. 360* as follows:

> "If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.
>
> "After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principal to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule common to contracts generally, applies that, where money is due and there is a default in payment, interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

In *Federal Surety Co. v. White, (Colo.) 295 Pac. 281, 291* recently reported, interest of almost thirty per cent over the penalty of a bond was allowed. The bond in that case was given by a sub-contractor to the main contractor on a road contract, for the faithful performance of the sub-contract, the main contractor being compelled to complete the work because of the sub-contractor's breach. The suit was to recover the amount thus expended. The uncertainty of this amount was sufficiently illustrated by the fact that there was a reference

and many days of taking testimony were consumed before the referee. The interest was allowed notwithstanding that the bond contained an express condition that no judgment should be entered thereon in excess of the penalty of the bond. The court said:

> "If we adopt defendant's construction and limit the judgment to $20,000.00 for which counsel for defendant in this case contend, it would be profitable for surety companies to arbitrarily and habitually withhold payment of just claims, in order to partially reimburse themselves for losses, to the extent of the interest on the principal amount, for such period as they might delay payment, while surety companies which admit their obligations, and promptly pay their losses, would be penalized for their promptness. This is not the policy of the law."

Referring to and distinguishing corporate sureties, the court also quoted from the opinion of another court as follows:

> "In this day and age of corporate sureties, when the burden is lightened by the payment of adequate premiums, and their final liabilities ofttimes secured by counter indemnity, the strictness of the old rule is relaxed, and the modern day surety company must show some injury done before they can be absolved from the contracts which they clamor to execute."

On the general subject of interest see *28 L. R. A. (N. S.) 1.*

From another view, under Section 7725, these claims upon this bond clearly bear interest. That section imposes interest on money due on an instrument of writing, among other things. Illinois has a similar statutory provision. In the case of *Sanford Coal Co. v. Wisconsin Bridge & Iron Co., 293 Fed. 735,* the cases in Illinois are reviewed, it being pointed out that Illinois courts had uniformly held that money due upon penal bonds, among other written instruments, bear interest. The Illinois statute provided for interest on "all moneys after they become due on any bond, bill, promissory note, or other instrument of writ-

ing." It will be noted our statute merely says "instrument of writing."

At page 31 of Appellant's brief it is again stated that by the findings of the trial court Appellee was given only the sum of $10870.40 as principal and that the balance of the judgment is accounted for as interest. There follows a tabulation which pretends to show the amounts in which the court allowed the respective claims. It is there admitted that this information "does not clearly appear from the record herein," but it is suggested that we would necessarily concede the correctness of the figures.

Our answer is that Appellant's counsel made their own record, and to ask us to make this concession is nothing more nor less than asking us to waive the shortcomings of the record and, in effect, stipulate to facts not in the record. However, we also are not entirely content with the amount of the judgment. We believe the evidence warrants a much larger recovery.

The suggestion is indeed naive. It is particularly inappropriate and out-of-keeping with the effort to avoid correcting the record covering the proceedings at the trial.

These claims have been in court for nearly nine years. In this protracted litigation they have survived and prevailed in the face of every legal obstacle which astute and capable counsel could devise. Certainly no leniency has been shown the claimants, and none should be asked of them.

Appellant's counsel made their own record. We submit this case upon that record.

Respectfully submitted,

BROWN, WIGGENHORN & DAVIS,

Attorneys for Appellee.

Service of the within and foregoing brief and receipt of a copy thereof acknowledged this.....day of November, 1931.

WOOD & COOKE.

By.....

Attorneys for Appellant.

STATUTES

No. 6483

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Petition for Rehearing

STERLING M. WOOD
ROBERT E. COOKE
Billings, Montana.
Attorneys for Appellant.

Filed....., 1931

..... Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

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STERLING M. WOOD
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Billings, Montana.
Attorneys for Appellant.

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United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Petition for Rehearing

Comes now the Appellant in the above entitled action, by and through the undersigned, its attorneys, and respectfully petitions the Court for a rehearing therein upon the grounds and for the reasons following, to-wit:

1. That the decision of the Court herein has disregarded the stipulation upon which the appeal was heard, and is likewise contrary to the record on appeal, and,

2. That the decision of the Court herein disregards and is in conflict with settled and controlling rules of fundamental law.

In support of the foregoing petition for rehearing we, the undersigned attorneys for the Appellant, hereby certify, in compliance with the rules of this Court, that the petition for rehear-

ing here presented is, in our judgment, well founded, and that it is not interposed for delay.

Dated at Billings, Montana, this 6th day of January, A. D. 1932.

STERLING M. WOOD,
ROBERT E. COOKE,
Attorneys for Appellant.

OUTLINE OF ARGUMENT

ARGUMENT

I.

THE COURT'S DECISION OF DECEMBER 14, 1931, IS CONTRARY (A) TO THE STIPULATION UNDER WHICH THE APPEAL WAS HEARD, AND, (B) TO THE RECORD ON APPEAL.

Subdivisions (A) and (B) will be considered together.

The Court in its said decision says:

> "The findings of the Court determined the amounts to be allowed as follows: Queenan, $1737.62, interest from February 2, 1923; Fallman, $2027.00, interest from March 1, 1923; Wickliff, $3087.00, interest from March 3, 1923; Kunkle, $850.00, interest from December 24, 1922; Yegen, $1324.00, interest from February 1, 1923; Martin, $7396.41, interest from December 5, 1922; Kurk, $562.30, interest from January 1, 1923; Total, exclusive of interest, $16,984.43. The interest rate used was stated to be eight per cent. per annum. The principal sum of the judgment was $17,963.72. Interest included, therefore, is the difference between the amounts last given or $979.29."

With entire deference to the Court, we respectfully submit that these quoted statements from its decision herein are contrary to fact, contrary to the record, and contrary to the stipulation of counsel made in open court at the time this appeal was argued. The conclusion reached by the Court in its decision rests upon the foregoing figures. Basing its conclusion upon them the Court has decided that the judgment entered "does not include enough interest to correspond" to the findings. Therefore, the Court has ruled that the Appellant is entitled to no relief upon this appeal.

The case was submitted, as will be pointed out presently,

upon the proposition that the principal sum awarded by the judgment was $10,870.40 (Tr. (2) 16, and the schedule hereinafter mentioned set forth upon page 31 of Appellant's brief) —not $16,984.43 as the Court says in the matter, supra, quoted from its decision. The schedule in question shows the separate amounts demanded in the amended complaint and those finally allowed by the trial court. The fault to be found with the figures, supra ,used by this Court in its decision is that, mistakenly, they have been taken as sums found to be payable by the trial court. Actually they are sums the Appellee herein requested the trial court to find to be payable.

The Court has overlooked the fact that, at the time of oral argument, and when a typewritten transcript of the evidence taken at the trial was submitted by both counsel to the Court to be considered upon this appeal, the attorneys for Appellant and Appellee then agreed in open Court, since the record did not supply all the facts and it was desirable to have the merits of the controversy settled, that the transcript in question should be used in the disposition of this appeal, as well as the schedule set forth upon page 31 of Appellant's brief, that the schedule is correct and that it shows the amounts of principal found by the Court below to be payable to each claimant. This schedule was particularly called to the Court's attention at the time of oral argument and was the subject of discussion between the members of the Court and counsel. For the convenience of the Court the schedule is set forth again herein. As stated, it shows the principal amounts demanded in the amended complaint and the principal sums for which recovery was allowed by the lower court for the use and benefit of the various claimants, viz:

	Amount Demanded	*Amount Recovered*
B. A. Kurk	$ 1163.20	$ 562.30
E. C. Riley	1081.45	.....
W. H. Queenan	1542.62	.....
C. F. Wickliff	3787.00	368.83
J. J. Fallman	2110.17	368.76
John I. Kunkle	880.00	850.00
Dave C. Yegen	1324.00	1324.00
B. J. Martin	6753.32	6753.32
B. J. Martin	643.19	643.19
	$19284.95	$10870.40

It is, therefore, clear that Appellant has the right to demand that this appeal be determined upon basis of the figures in the schedule mentioned, that is, the figures showing the amount of principal found to be payable to each claimant by the lower court. The difference between such figures and those used by the Court in its decision herein is apparent at a glance. Thus, Queenan was allowed nothing at all, but this Court has said in its decision that the court found for Queenan in the sum of $1737.62 with interest from February 2, 1923. The court found for Fallman in the principal amount of $368.76, not $2027.00, as this Court has said. Wickliff was awarded only $368.83 but this Court states the amount is $3087.00. The remaining figures used by the Court herein are correct.

The judgment rendered from which this appeal is taken includes the sum of $7093.32 interest, not $979.29 as this Court has said. This interest figure of $7093.32 is reached by deducting the amount recovered, or principal sum of $10,870.40, supra, from the amount of the judgment, (Tr. (2) 15) of $17,963.72. Accepting as correct the conclusion of the Court that the claims of all claimants, other than Yegen and Martin, draw interest from the dates of completion of services rendered to the date

ERRATA

The following changes are hereby made on page 7. Substitute J. J. Fallman for C. F. Wickliff in the schedule there printed, and add the name C. F. Wickliff to the statement, showing $368.83 recovered by him, $234.29 interest recoverable, and $603.12 as the total recoverable by him. This changes the total of the statement from $11644.98 to $12248.10 and corresponding changes should be made where that total is elsewhere mentioned.

of the judgment, the following figures, it is believed, will be found to be correct:

Name of Claimant	*Principal Amount Recovered*	*Interest Recoverable*	*Total*
B. A. Kurk	$ 562.30	$365.55	$ 918.85
E. C. Riley	None	None	None
W. H. Queenan	None	None	None
C. F. Wickliff	368.76	232.66	601.42
John I. Kunkle	850.00	554.20	1404.20
Dave C. Yegen	1324.00	None	1324.00
B. J. Martin	6753.32	None	6753.32
B. J. Martin	643.19	None	643.19
Total			$11644.98

Interest, as calculated, supra, has been figured from the respective dates upon which work was completed to the date of the judgment and at the rate of 8% per annum. Therefore, accepting the Court's theory of the law of this case as announced in its decision herein, the judgment, upon the case as submitted upon this appeal, should be for $11,644.98 instead of for $17,-936.72. The judgment of the lower court should be reversed, instead of affirmed, or be modified as stated.

This Court in its decision has wholly overlooked the fact that the lower court, after the mandate of this Court in the case in 42 Fed. (2d) 957, did not make any findings of fact, as such. Counsel for the Appellee, after such mandate, filed a renewed request for findings of fact and conclusions of law. (Tr. (2) 2, et seq.) Thereafter (Tr. (2) 13) the lower court adopted as its findings and conclusions of law the findings and conclusions presented in the renewed request of the Appellee, *but with certain exceptions.* Thus the Court says in its order:

"It is ordered that the within findings and conclusions

(meaning those incorporated in the renewed request of the Appellee) be and the same are hereby adopted, approved and made as and for the findings of fact and conclusions of law by the court, *with the exception of findings numbered 10, 11 and 12, which are hereby modified to conform to objections by defendant, numbered 2, 3 and 4;* otherwise and in other respects the objections by defendant are overruled and denied." (Tr. (2) 13)

Therefore this Court has erred in using, as it has done in its decision herein, the figures in the *requested* findings. These requested findings were not adopted in toto as the trial court's findings. As pointed out, supra, certain of the findings requested were modified by the court. Because the court, in its order, did not indicate to what extent they were modified, the schedule above mentioned was prepared and printed in Appellant's brief. Then, in open court, counsel for both parties agreed that this schedule was correct and should be used in the determination of this appeal. By the schedule and the stipulation this Court was given exact figures; but this Court has erroneously used as a basis for its decision the figures in the *requested* findings instead of those in the findings made.

This Court has referred to the typewritten transcript of the evidence in deciding this case, which transcript was tendered as a part of the stipulation of counsel so made in open court, although the transcript is not, strictly, a part of the record, as such. Therefore, justice certainly requires that the oral stipulation be considered in its entirety in the decision by this Court. In other words, the schedule showing the amounts of principal actually allowed each claimant by the lower court must also be considered or the case will be unfairly decided. A consideration of that schedule by this Court will establish at once that the decision herein of December 14, 1931, is erroneous. But apart

from the schedule in question this Court cannot justify the figures it has used. It cannot ignore the fact that under the order of the lower court (Tr. (2) 13) the requested findings were modified in part and, therefore, that the requested findings are not the trial court's findings.

It is, therefore, respectfully submitted, upon the foregoing ground alone, that this petition for rehearing is justified, and should be granted. The decision rendered is, mistakenly of course, based upon a false premise, that is, one that is contrary to fact.

II.

UPON THE RECORD AND THE LAW THE JUDGMENT OF THE LOWER COURT MUST BE REVERSED.

At the time of oral argument herein this appeal was presented in a most informal manner. The submission was informal in that matter not a part of the record was discussed. It was further informal because by oral agreement of counsel in open court this Court was requested to consider all such matter that was not a part of the record (such as the typewritten transcript of the evidence that was not in a bill of exceptions and the schedule of the amounts awarded each claimant) to the end that a decision on the merits might be rendered—one that was on the merits in every sense of the word and that would end the controversy without further consideration of merely procedural questions.

But unless this case is to be so decided upon the merits and, thus, upon all the facts submitted at the time of oral argument, whether in the record or not, necessarily Appellant must stand upon the record alone. Thereunder it is believed that the judgment below cannot be sustained, but must be reversed.

In the assignment of errors in the court below (Tr. (2) 19 and 20) and again in the specifications of errors in Appellant's brief in this Court (Page 7 thereof) it is contended, expressly, that the lower court erred in the making and entry of its judgment of February 18, 1931, in that (a) the judgment is contrary to law, and (b) the judgment is not supported by the record in the action.

It appears from the record in this case that after the mandate of this court in 42 Fed. (2d) 957 there was no trial of the action. Yet in 42 Fed. (2d) 957 the mandate of this Court merely

reversed the judgment then outstanding, "with directions to take further proceedings not out of harmony" with the Court's decision. This action is one at law. Originally it was tried to the court without a jury under written stipulation waiving a jury. Yet when the case was remanded, under the mandate mentioned, no further trial occurred. Counsel for the Appellee here, plaintiff in the court below, then merely filed a renewed request for findings of fact and conclusions of law. (Tr. (2) pages 2 to 12) Thereupon the lower court by order adopted as its findings, with certain modifications, the findings proposed in the renewed request. That order of the Court points out expressly that the findings were so adopted over objections by defendant, the Appellant here. (Tr. (2) 13) There is nothing in the record before this Court to show that a jury was waived, either in writing or otherwise, after the mandate of this court in 42 Fed. (2d) 957.

The foregoing briefly epitomizes the condition of the record before the Court. We thus have upon this appeal an action at law, where a jury has not been waived, which the lower court has decided without any trial whatsoever, either with or without a jury, and in which its findings are necessarily based upon evidence taken at a former trial. At such former trial the judgment was for the Appellant here and was reversed by this Court upon appeal. It should be apparent, without argument, that this procedure is without any warrant of law whatsoever, and is in disregard of constitutional guaranties. In Cyc of Federal Procedure, Volume 4, Paragraph 1380, page 874, the author says:

"A statutory waiver of jury trial in the first trial of a

cause is not a waiver of a trial by jury in a later trial of the same action."

Again in Volume 6, paragraph 3071, the author says:

"Assuming that something more than to execute the judgment or to enter a judgment as directed and execute that remains to be done, the mandate will govern, if it directs what is to be done; otherwise it implies that the ordinary course will be followed to complete the necessary procedure. A direction in the mandate in an action at law for certain named proceedings after mandate is, in the absence of anything in the mandate or opinion indicating a different intention of the appellate court, to be construed as referring to such proceedings as they are commonly known and administered in federal courts of law; and in equity such as are normal in federal equity courts."

In Northern Pacific Railway Company vs. Van Dusen-Harrington Company, 34 Fed. (2d) 786, the court says:

"A stipulation on the first trial of a law case, waiving a jury, does not affect the right of either party to demand trial by jury after the judgment of the first trial has been reversed and the cause remanded. * * * This being so, and a finding of fact in a jury-waived action being the equivalent of a verdict of a jury, it must therefore be the law that when a party to such an action has secured a finding of fact in his favor, the Circuit Court of Appeals cannot, upon a reversal of the case for the reason that this finding of fact was not justified by the evidence, direct the entry of judgment, but can only order a new trial."

Such is the exact situation here. Originally when the case at bar was first tried the decision was in favor of the surety company upon appropriate findings. That decision was reversed by this Court in 42 Fed. (2d) 957, and the mandate above mentioned then issued. However, a new trial did not take place, which is clearly contrary to law.

In Northern Pacific Railway Company vs. Van Dusen-Har-

rington Co., supra, a new trial was granted in a law action that had been tried theretofore to the court without a jury under the usual stipulation. After the first trial of the action the judgment was reversed in the Circuit Court of Appeals and its mandate, as the mandate involved in the case at bar, merely reversed the judgment and remanded the cause for further proceedings in accordance with the court's opinion. See 32 Fed. (2d) 466, and 470. Hence the case could be disposed of only by a new trial.

In Burnham, et al. vs. North Chicago St. Railway Co. 88 Fed. 627, decided by the Circuit Court of Appeals for the 7th Circuit, paragraphs 1 and 3 of the syllabus of the case read as follows:

> "Where a judgment based on agreed facts is reversed and the cause remanded on the ground that the facts stipulated are evidential only, and cannot take the place of findings, a new trial is required, in which either party has the right to introduce additional evidence not inconsistent with the stipulation."

> "Where by stipulation a jury is waived, and a cause tried to the court, such stipulation does not operate as a waiver of a jury on a second trial, after the judgment has been reversed and the cause remanded."

Such, too, is the doctrine of the Circuit Court of Appeals of the 8th Circuit, as announced in F. M. Davies Co. vs. Porter, 248 Fed. 397.

As pointed out, supra, unless the mandate of the appellate court otherwise provides, a direction in a mandate in an action at law for certain named proceedings after mandate is to be construed to require proceedings as they are commonly known and administered in federal courts of law. The Constitution

of the United States in the Seventh Amendment thereof preserves the right of trial by jury in suits at common law, such as the action now before the Court, and expressly requires that no fact triable by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

In Mutual Reserve Life Insurance Co. vs. Heidel, 161 Fed. 535, decided by the Circuit Court of Appeals for the 8th Circuit, the court says:

> "A trial according to the course of the common law is a trial before a jury under right rulings made by the trial judge in the absence of the jury, *and the only remedy for prejudicial errors in a national court is a new trial.*" (Citing numerous cases)

The question here involved is settled by controlling authority in the case of Capital Traction Co. vs. Hof, 174 U. S. 1, 43 L. Ed. 873 and 876. There the court, quoting from a decision by Mr. Justice Story, says:

> "But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.' 3 Pet. 446-448 (7: 736, 737)
>
> This last statement has been often reaffirmed by this court."

Therefore the judgment appealed from in the case at bar is contrary to law and not supported by the record. No trial

of any sort has been had since the mandate of this Court in 42 Fed. (2d) 957. Yet the case could be disposed of under the law only by a new trial. Therefore, in this view of the case the judgment of the lower court must be reversed and the case must be remanded for a new trial. It is well settled law that an appeal from a judgment is a sufficient exception to the judgment.

Fellman vs. Royal Ins. Co. 185 Fed. 689.

Under the foregoing argument it is clear that the petition for rehearing should be granted.

Respectfully submitted,

STERLING M. WOOD

ROBERT E. COOKE,

Attorneys for Appellant.

Service of the within and foregoing Petition for Rehearing and receipt of copy thereof acknowledged this..... day of January, A. D. 1932.

.....

Attorneys for Appellee.

No. 6484

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Parker Printing Company, 545 Sansome Street, San Francisco 7-18-31—60

No. 6484

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

COUNSEL OF RECORD:

For Plaintiff and Appellee:

GRAHAM K. BETTS, # 1402 Smith Tower, Seattle, Wash.

W. G. BEARDSLEE, #511 Alaska Bldg., Seattle, Washington.

WRIGHT & WRIGHT, #400 Burke Bldg., Seattle, Washington.

For Defendant and Appellant:

ANTHONY SAVAGE, United States District Attorney, #310 Federal Building, Seattle, Washington.

CAMERON SHERWOOD, Assistant United States District Attorney, #310 Federal Building, Seattle, Washington. [1*]

United States District Court, Western District of Washington, Northern Division.

No. 20072

JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff and complains and alleges:

I.

That the plaintiff is the duly qualified and acting administratrix of the estate of James W. White-

*Page number appearing at the foot of page of original certified Transcript of Record.

head, Deceased, having been appointed as administratrix of said estate in Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

II.

That James W. Whitehead enlisted for Military Service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of $10,000.00 designating no authorized person as beneficiary on said policy; [1] that thereafter, there was deducted from his monthly pay as premium for said insurance, the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead, the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate.

IV.

That during the course of said military service, said James W. Whitehead contracted Pulmonary Tuberculosis and Paresis as a result whereof he was

discharged as hereinbefore stated, on the 20th day of November, 1918 totally and permanently disabled from continuously following any substantially gainful occupation, by reason whereof, there became due and owing the sum of $57.50 per month, to the deceased on said date.

V.

That as an approximate result of said disability, said James W. Whitehead, died on the 30th day of September, 1921 by reason whereof his estate became entitled to receive from the defendant, the sum of $57.50 per month from said date.

For a further cause of action, the plaintiff alleges:

I.

All facts and matters pleaded in Paragraphs One, Two and Three of the first cause of action, which paragraphs are by this plaintiff made a part hereof.

II.

That after the death of the insured and during the month of January, 1922, the defendant by and through its agents, the Medical Board of Review and Board of Appeals of the United States Veteran's Bureau did *made* a compensation rating in favor of the deceased from a date prior to the lapse of his policy to wit: from the date of his discharge, which rating was sufficient to pay premiums on his policy to and including the date of his recognized [2] total and permanent disability to wit: July 27th, 1921, which compensation was due and uncollected

on said date and was thereafter paid to the plaintiff, as administratrix of his estate.

III.

That in addition to the rating referred to in Paragraph Six, the deceased was entitled to compensation for his disabilities tuberculosis and paresis, but the defendant, through its agent, the Director of U. S. Veteran's Bureau did willfully and arbitrarily refuse to make an award for such disability.

IV.

That by reason of the foregoing, the said policy of insurance herein sued upon did not lapse, but was revived and kept in full force and effect until the date of recognized total and permanent disability to wit: July 27th, 1921, and thereafter and until the date of his death, to wit: September 30th, 1921, by reason of and under the terms of Section 305 World War Veteran's Act as amended.

That the plaintiff made proof of all the foregoing to the defendant, and demanded payment of the aforesaid amount, but that the defendant disagreed with the plaintiff as to her claims, and has refused to pay the same, or any part thereof, other than the sum of $168.48 which was paid to the plaintiff on or about the 19th day of May, 1922.

WHEREFORE, plaintiff prays judgment against the defendant for the accrued monthly installments of $57.50 per month commencing on the 20th day of November, 1918, or in lieu of thereof for the

accruing monthly installments commencing on the 27th day of July, 1921.

GRAHAM K. BETTS,
WRIGHT & WRIGHT,
Attorneys for Plaintiff. [3]

State of Washington,
County of King.—ss.

Jessie Smith being first duly sworn upon her oath deposes and says, that she is the plaintiff in the foregoing action, that she has read the within and foregoing Amended Complaint, knows the contents thereof, and the same is true as she verily believes.

JESSIE SMITH.

Subscribed and sworn to before me this 12th day of December, 1930.

[Seal] GRAHAM K. BETTS,
Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the within Amended Complaint this 13 day of Dec., 1930.

ANTHONY SAVAGE,
Attorney for Defendant.

[Endorsed]: Filed Dec. 13, 1931. [4]

(Title of Court and Cause.)

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant in the above entitled action by Anthony Savage, United States Attorney

for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney of the United States Veterans Bureau, and for answer to the amended complaint of the plaintiff herein, admits, denies and alleges as follows:

FOR ANSWER TO THE FIRST CAUSE OF ACTION PLEADED IN PLAINTIFF'S AMENDED COMPLAINT, DEFENDANT ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I.

For answer to Paragraph I of the first cause of action of plaintiff's amended complaint, defendant alleges that it has not sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations therein contained, and therefore denies the same.

II.

For answer to Paragraph II of the first cause of action of plaintiff's amended complaint, defendant admits the same.

III.

For answer to Paragraph III of the first cause of [5] action of plaintiff's amended complaint, defendant admits that on July 30, 1918 James William Whitehead applied for war risk insurance in the amount of $10,000 payable in monthly installments of $57.50 each, in the event of his death or permanent and total disability while the contract of in-

surance was in force and effect, and admits that the premiums were paid thereon through November 1918, but denies each, every and singular the remaining allegations therein contained.

IV.

For answer to Paragraph IV of the first cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

V.

For answer to Pargaraph V of the first cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

FOR ANSWER TO THE SECOND CAUSE OF ACTION PLEADED IN PLAINTIFF'S AMENDED COMPLAINT, DEFENDANT ADMITS, DENIES AND ALLEGES AS FOLLOWS:

I.

For answer to Paragraph I of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained except wherein the same are specifically admitted by the defendant in its answer herein to the plaintiff's first cause of action as alleged in its amended complaint.

II.

For answer to Paragraph II of the second cause of action of plaintiff's amended complaint, defen-

dant denies each, every and singular the allegations therein contained. [6]

III.

For answer to Paragraph III of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

IV.

For answer to Paragraph IV of the second cause of action of plaintiff's amended complaint, defendant denies each, every and singular the allegations therein contained.

WHEREFORE, having fully answered both causes of action alleged by the plaintiff in its amended complaint herein, defendant prays that the same may be dismissed with prejudice and that it may go hence with its costs and disbursements to be taxed herein according to law.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney,
United States Veterans Bureau.

United States of America,
Western District of Washington.—ss.
Northern Division.

Tom De Wolfe, being first duly sworn on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, and as such makes this affidavit on behalf of the United States of America; that he has read the foregoing Answer to Amended Complaint, knows the contents thereof and believes the same to be true.

TOM DeWOLFE

Subscribed and sworn to before me this 16th day of December, 1930.

[Court Seal] T. W. EGGER,
Deputy Clerk, U. S. District Court
Western District of Washington. [7]

Received a copy of the within Amended Answer this 10th day of Dec., 1930.

GRAHAM K. BETTS,
WRIGHT & WRIGHT,
Attorneys for Plff.

[Endorsed]: Filed Dec. 13, 1930 [8]

(Title of Court and Cause.)

PETITION FOR JOINDER OF ADDITIONAL PARTY DEFENDANT.

Comes now the United States of America, defendant herein, by Anthony Savage, United States At-

torney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and shows to the Court as follows:

I.

That in the policy of War Risk Insurance mentioned in plaintiff's complaint, plaintiff procured his wife Lilly Gladys Whitehead to be designated as a beneficiary of the assured.

II.

That said Lilly Gladys Whitehead received a decree of divorce from said James W. Whitehead, the assured mentioned in said complaint, on the 1st day of August, 1921.

III.

That said Lilly Gladys Whitehead was within the permitted class of beneficiaries specified by Section 300, World War Veterans Act at the time of her designation as beneficiary in the policy mentioned in the complaint herein. That she was also designated beneficiary in said policy at the time of the alleged maturity of the insurance mentioned in the complaint herein, which alleged maturity as stated in the complaint, took place on the 30th day of September, 1921.

IV.

That Section 300, World War Veterans Act provides as follows:

"Where a beneficiary at the time of designation by the insured is within the permitted class of beneficiaries and is the designated beneficiary at the time

of the maturity of the insurance because of the death of the insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed." [9]

V.

That the joinder of Lilly Gladys Whitehead as party defendant in this action is necessary to a complete and proper termination of this action.

WHEREFORE, your petitioners pray that an order be entered herein requiring plaintiff herein to join as an additional party defendant in this action Lilly Gladys Whitehead.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.

United States of America,
Western District of Washington—ss.
Northern Division.

Tom DeWofe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Petition for Joinder of Additional Party Defendant, knows the contents thereof, and believes the same to be true.

TOM DeWOLFE.

Subscribed and sworn to before me this 12 day of July, 1929.

[Seal] T. W. EGGER,

Deputy Clerk, United States District Court, Western District of Washington.

Received a copy of the within Petition this 12th day of July, 1929.

W. G. BEARDSLEE,
WRIGHT & WRIGHT,
Attorneys for Plaintiff.

[Endorsed]: Filed July 13, 1929. [10]

(Title of Court and Cause.)

HEARING.

(Order Granting Petition for Joinder of Additional Party Defendant.)

Now on this 22nd day of July, 1929, G. K. Betts, Esq., appearing as counsel for the plaintiff and Tom DeWolfe, Assistant United States Attorney, appearing for the defendant, this matter comes on for hearing on petition for joinder of additional party defendant, which is argued by counsel and the same is granted.

Journal No. 17 at Page 210. [11]

(Title of Court and Cause.)

MOTION

Comes now the plaintiff above named and moves the Court for an order directing publication of Summons in the above entitled matter against Lilly Gladys Whitehead. This motion is based upon the affidavit hereto attached.

GRAHAM K. BETTS,
W. G. BEARDSLEE,
WRIGHT & WRIGHT,
Attorneys for Plaintiff. [12]

(Title of Court and Cause.)

AFFIDAVIT.

State of Washington,
County of King,—ss.

Graham K. Betts, being first duly sworn, on oath deposes and says: That he is one of the Attorneys of record for the plaintiff above named; that said cause is being prosecuted by the said plaintiff as administratrix of the estate of James W. Whitehead, deceased, to enforce payment of a policy of war risk insurance; that upon motion of the defendant, one Lilly Gladys Whitehead, who was designated as beneficiary in the said policy, was ordered to be joined as party defendant in the said cause by order of this Court; that the said Lilly Gladys Whitehead has not been located to effect service of Summons

and Complaint upon her, and that her whereabouts are unknown; that the Summons and Complaint were filed with the United States Marshall for the purpose of effecting service thereof; that the said United States Marshall has filed his return of "not found, and it will therefore be necessary to effect service of said Summons by publication.

GRAHAM K. BETTS,

Subscribed and sworn to before me this 15 day of April, 1930.

[Seal] RUSSELL H. FLUENT,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Apr. 16, 1930. [13]

(Title of Court and Cause.)

This matter having come on for hearing on motion of the plaintiff above named by and through her attorney, Graham K. Betts, said motion having been supported by an affidavit of said attorney, from which it appearing to the Court that Lilly Gladys Whitehead was by order of this Court made a party defendant herein, and it appearing further that service of the summons and Complaint upon said Lilly Gladys Whitehead has not been effected by reason of the inability to locate the said Lilly Gladys Whitehead, and the United States Marshall having made and filed his return of "not found", and that it is therefore necessary and proper that service of

said Summons be effected by publication, now, therefore,

IT IS ORDERED that the defendant Lilly Gladys Whitehead be served in the above matter by publication of the Summons in the Daily Journal of Commerce, a newspaper of general circulation in King County, Washington, for six successive weeks, requiring the said defendant to appear and defend said action within sixty (60) days after the date of the first publication under penalty of default.

JEREMIAH NETERER,
Judge.

O. K.
TOM DeWOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed April 16, 1930. [14]

PUBLISHER'S AFFIDAVIT

State of Washington,
County of King,—ss.

Before me, the undersigned, a Notary Public, this day personally came M. F. Brown, who, being first duly sworn, according to law, says that he is the Business Manager of Daily Journal of Commerce, a daily newspaper published at Seattle, in said county and State, and that the publication, of which the annexed is a true copy, was published in said paper on the 24th day of May, 1930, and once each

week thereafter for five consecutive weeks and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

M. F. BROWN,

Subscribed and sworn to before me this 28th day of June, 1930.

[Seal] ED. M. BRITZ,

Notary Public in and for the State of Washington, residing at Seattle. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

Jessie Smith, Administratrix of the Estate of James W. Whitehead, deceased, Plaintiff, vs. United States of America, and Lilly Gladys Whitehead, Defendants. No. 20072. Summons by Publication.

United States of America to the said Lilly Gladys Whitehead, defendant:

You are hereby summoned to appear within sixty (60) days after the date of the first publication of this Summons, to-wit: within sixty (60) days after the 24th day of May, 1930, and defend the above entitled action in the above entitled Court, and answer the Complaint of the plaintiff and serve a copy of your Answer upon the undersigned attorneys for plaintiff at their office below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of

the Complaint, which has been filed with the clerk of said Court. The object of this action is to determine the rights of this plaintiff on a policy of war risk insurance issued to the deceased.

W. G. BEARDSLEE,
GRAHAM K. BETTS,
WRIGHT & WRIGHT,
Attorneys for Plaintiff.

Office and Post Office Address: 1401 Smith Tower, Seattle, Washington (3108.)

Publisher's Affidavit Endorsed: Filed July 8, 1930. [16]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys, that a jury trial in the above cause be and the same hereby is waived and both parties hereby consent to trial of the said action before the Court without a jury.

Dated this 12th day of December, 1930.

WRIGHT & WRIGHT,
GRAHAM K. BETTS,
Attorney for Plaintiff.
ANTHONY SAVAGE,
United States District Attorney.
E. I. BURNS,
Attorney for U. S. Veterans Bureau.

[Endorsed]: Filed [Date not legible] [17]

(Title of Court and Cause.)

EXCERPT FROM TRIAL RECORD SHOWING DEFAULT AS TO DEFENDANT LILLY GLADYS WHITEHEAD.

Now on this 18th day of December, 1930, trial of the above entitled cause is resumed pursuant to adjournment. * * *. Both sides rest. Counsel for the defendant moves for a dismissal and for judgment. Counsel renews motion for non-suit as to both causes of the action. Said cause is argued by counsel and judgment is entered in favor of the plaintiff. The defendant is to be allowed certain costs, $67.90. Proclamation is made as to Lilly Gladys Whitehead who failed to appear and there is no response. The defendant excepts to the findings of the court. A judgment is directed to be prepared.

Journal No. 18, at Page 845. [18]

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter having come on regularly for trial before the undersigned judge of the above entitled Court, without a jury, plaintiff appearing by her attorney, Graham K. Betts, defendant appearing by its attorneys, Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney, for the Western District of Wash-

ington, and E. I. Burns, Special Counsel for the United States Veterans' Bureau, and additional defendant failing to appear and having been adjudged to be in default, and plaintiff having offered and submitted her evidence, and the defendant having offered and submitted its evidence, and the additional defendant offering no evidence, and the Court having heard the evidence and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law herein:

FINDINGS OF FACT.

I.

That the plaintiff is the duly qualified and acting administratrix of the estate of James W. Whitehead, Deceased, having been appointed as administratrix of said estate in [19] Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

II.

That James W. Whitehead enlisted for military service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insur-

ance in the sum of $10,000.00, designating no authorized person as beneficiary on said policy; that thereafter there was deducted from his monthly pay as premium for said insurance the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

IV.

That said James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

V.

That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the [20] United States Veterans' Bureau.

VI.

That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

VII.

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November 31, 1918, and was not

in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

VIII.

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages ranging from $5.11 a day to $6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers. [21]

IX.

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau

of a compensation disability rating for the purposes of compensation.

X.

That a judgment for costs in the sum of $67.90 in cause Number 12140 in the above entitled Court remains unsatisfied by plaintiff herein, and is a proper offset against any judgment obtained by plaintiff in this cause.

DONE in open Court this ..... day of December, 1930.

.....,
United States District Judge.

Presented and refused 12/29/30.

NETERER,
Judge.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is not entitled to recover on either cause of action herein.

II.

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

DONE in open Court this..... day of December, 1930.

.....
United States District Judge.

Presented and refused 12/21/*31*.

NETERER. [22]

Received a copy of the within proposed findings of fact and Conclusions of Law this 24 day of Dec. 1930.

GRAHAM K. BETTS,
Attorney for Plff.

[Endorsed]: Filed Dec. 29, 1930. [23]

(Title of Court and Cause.)

EXCEPTIONS OF DEFENDANT TO COURT'S FAILURE TO MAKE AND ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANT.

Comes now the defendant, United States of America, by Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney, for the Western District of Washington, and makes exceptions herein as follows:

I.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of Fact No. I.

II.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of Fact No. II.

III.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. III.

IV.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. IV.

V.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. V. [24]

VI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VI.

VII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VII.

VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. VIII.

IX.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. IX.

X.

Defendant excepts to the refusal of the Court to make and enter defendant's requested findings of fact No. X.

XI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. I.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. II.

Exceptions, hereinabove noted, allowed.

DONE in open Court this 29th day of December, 1930.

NETERER,
United States District Judge.

[Endorsed]: Filed Dec. 29, 1930. [25]

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter having come on for trial before the undersigned Judge of the above entitled Court sitting without a jury on the 17th day of December, 1930, the plaintiff appearing in person and by her attorney, Graham K. Betts, the defendant, United States of America, appearing by Cameron Sherwood, Assistant United States Attorney and E. I. Burns, Special Counsel of the United States Veteran's Bureau, and the defendant, Lilly Gladys Whithead failing to appear either in person or by counsel, proclamation having been made and default ordered against the said defendant Lilly Gladys Whithead, evidence having been adduced by both parties and arguments having been made in support thereof,

the Court being fully advised in the premises makes the following Findings of Fact.

FINDINGS OF FACT.

I.

That the deceased, James W. Whithead, enlisted for service in the United States Army in July 1918 and was honorably discharged therefrom on the 20th day of November on a surgeon's certificate of disability.

II.

That during the plaintiff's military service he applied [26] for and was granted a Policy of War Risk Insurance of $10,000.00 and premiums were paid thereon during his service in the United States Army.

III.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of James W. Whithead, deceased, in Seattle, King County, Washington.

IV.

That during the period of service of the deceased in the United States Army, he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921 in the State Insane Asylum, by reason whereof he became entitled to receive from

the defendant the sum of $57.50 per month commencing on the said 20th day of November, 1918.

V.

That on said date of discharge to wit: November 20th, 1918, the policy of insurance herein sued upon was in full force and effect.

VI.

That a judgment for costs in the sum of $67.90 in a cause number 12140 in the above entitled Court remains unsatisfied by the plaintiff herein and is a proper offset against plaintiff's judgment herein.

VII.

That the defendant, Lilly Gladys Whitehead was duly and regularly served in this action by publication made in the manner provided by order of this Court made and entered on the 15th day of April, 1930. [27]

VIII.

That the Defendant, United States of America has disagreed with the Plaintiff as to her claim.

DONE in open Court this 29th day of December, 1930.

(Signed) JEREMIAH NETERER,
Judge.

And from the foregoing Findings of Fact, the Defendant makes and enters the following

CONCLUSIONS OF LAW.

I.

That the Defendant has jurisdiction of the parties and of the subject matter of this action.

II.

That the Plaintiff is entitled to recover from the Defendant, United States of America, the sum of $57.50 per month commencing on the 20th day of November, 1918.

Done in open Court this 29th day of December, 1930.

JEREMIAH NETERER,
Judge.

Received a copy of the within Findings that 29th day of Dec., 1930.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Dec. 29, 1930. [28]

(Title of Court and Cause.)

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AS MADE AND ENTERED BY THE COURT.

Comes now the defendant, United States of America, by Anthony Savage, United States Attorney, and Cameron Sherwood, Assistant United States Attorney for the Western District of Washington,

and makes the following exceptions to the findings of fact and conclusions of law as made and entered by the Court:

I.

Defendant excepts to Finding of Fact No. IV on the ground that there was no competent proof tending to show that deceased became afflicted with paresis during the period of service in the United States Army, and that there was no competent proof tending to show that deceased was totally and permanently disabled from following continuously any substantially gainful occupation at the time of discharge from the United States Army on November 20, 1918; and on the further ground that the uncontroverted evidence adduced at trial showed that said decedent was, for a period of two years immediately after discharge from the United States Army, able-bodied, and that he carried on continuously a substantially gainful occupation, to-wit, that of switchman and switch foreman, earning the same wages and doing the same [29] work as others engaged in like occupations at the same time.

II.

Defendant excepts to Conclusion of Law No. II as made by the Court on the ground that there was no evidence upon which to base such a conclusion of law; the evidence on the contrary, showing that plaintiff is not entitled to recover from the defendant, United States of America, in the sum of $57.50 per month, or any other sum whatsoever.

Exceptions, hereinabove noted, allowed.

DONE in open Court this 29th day of December, 1930.

NETERER,
United States District Judge.

[Endorsed]: Filed Dec. 29, 1930. [30]

United States District Court, Western District of Washington, Northern Division.

No. 20072.

JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT.

This matter having come duly on for trial before the Honorable Jeremiah Neterer, Judge of the above entitled Court sitting without a jury on the 17th day of December, 1930, the Plaintiff appearing in person and by her attorney, Graham K. Betts, the Defendant, United States of America appearing by Cameron Sherwood, Assistant United States Attorney and E. I. Burns, Special Counsel of the United States Veteran's Bureau, and the Defendant, Lilly Gladys Whitehead, failing to appear and the respective parties having introduced *there* evidence

and having made argument in support thereof and the Court being fully advised in the premises having on the 18th day of December, 1930 rendered a judgment in favor of the Plaintiff and having subsequently thereto made and entered its Findings of Fact and Conclusions of Law, NOW, THEREFORE in accordance therewith,

IT IS ORDERED ADJUDGED AND DECREED that the Plaintiff as administratrix of the estate of James W. Whithead, deceased have and recover against the Defendant, United States of America the sum of $8,337.50, said amount being the accruing instalments of $57.50 per month due the estate of James W. Whithead, Deceased, commencing on the 20th day of November, 1918, and continuing to and including the installment due the 20th day of November, 1930 said latter date being the last due date of payment hereunder prior to the rendition of judgment, such payments to be made as by law in such cases provided, and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Graham K. Betts is entitled to receive from said judgment as a reasonable attorney fee for his services as attorney for the Plaintiff herein, the sum of $833.75, that being 10% of the said $8337.50 now due the estate of James W. Whithead, Deceased and the said Graham K. Betts, his heirs, executors or assigns is further entitled to receive the sum of 10% of each and every other payment hereinafter made to the heirs, executors, ad-

ministrators or assigns of the estate of James W. Whithead, Deceased or to the beneficiaries [31] of the deceased, made by reason of or as a consequence of the entrance of this judgment, such payments to be made as by law in such cases provided, and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Defendant, United States of America offset against the foregoing judgment award to the Plaintiff the sum of $67.90 said amount being due the United States by this Plaintiff as administratrix of the estate of James W. Whitehead, deceased, by reason of an unsatisfied judgment for costs in cause number 12140 in the above entitled Court.

To all of which the Defendant excepts and its exception is hereby allowed.

Done in open Court this 29th day of December, 1930.

JEREMIAH NETERER,
Judge.

O. K.
CAMERON SHERWOOD,
Ass't U. S. Atty.

O. K. as to form.
LESTER E. POPE,
Atty. U. S. V. B.

[Endorsed]: Filed Dec. 29, 1930. [32]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and petitions the Court for an order granting a new trial in the above entitled cause, for the following reasons, to-wit:

(1) Error in law occurring at the trial and duly excepted to by the defendant.

(2) Insufficiency of the evidence to justify the verdict.

(3) That the Court erred in denying defendant's Motion for Nonsuit at the conclusion of plaintiff's evidence.

(4) That the Court erred in denying defendant's motion for judgment at the conclusion of the entire case.

(5) That the Court erred in denying defendant's motion for nonsuit renewed at the close of all the testimony.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received copy of the within motion this 24 day of Dec. 1930.

GRAHAM K. BETTS,
Atty. for Plff.

[Endorsed]: Filed Dec. 26, 1930. [33]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL

THIS MATTER having come before the above entitled Court on the motion of the defendant herein for a new trial, and both parties having submitted said motion to the Court for ruling thereon, without argument, and the Court being duly advised in the premises; now, therefore, it is hereby

ORDERED and ADJUDGED that the defendant's motion for a new trial herein be, and the same hereby is, denied, and an exception is noted on behalf of the defendant.

DONE in open Court this 29 day of December, 1930.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.
GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 29, 1930. [34]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20th day of March, 1931, in which to lodge and settle its proposed Bill of Exceptions herein.

Dated at Seattle, Washington, this ..... day of February, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Atty.
GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Febr. 2, 1931. [35]

(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby

ORDERED that defendant herein may have up to and including the 1st day of March, 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

Done in open Court this 2nd day of February, 1931.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Febr. 2, 1931. [36]

(Title of Court and Cause.)

STIPULATION.

It is HEREBY STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 20 day of March, 1931, in which to lodge and settle its proposed Bill of Exceptions herein.

Dated at Seattle, Washington, this 5 day of March, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
GRAHAM K. BETTS.
Attorney for the Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [37]

(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby

ORDERED that defendant herein may have up to and including the 20th day of Mar., 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

Done in open Court this 5 day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

Received copy of within Order this 5th day of March, 1931.

GRAHAM K. BETTS,
Atty. for Plaintiff.

[Endorsed]: Filed Mar. 5, 1931. [38]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To JESSIE SMITH, Plaintiff, and GRAHAM K. BETTS, Attorney for said Plaintiff:

YOU and EACH OF YOU will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on the 29th day of December, 1930, and that the certified transcript

of record will be filed in the said Appellate Court within thirty days from the filing of this Notice.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of within Notice of Appeal this 5th day of March, 1931.

GRAHAM K. BETTS,

[Endorsed]: Filed Mar. 9, 1931. [39]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 29th day of December, 1930, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to

the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans Bureau.

Received a copy of the within Petition for Appeal this 5th day of March, 1931.

GRAHAM K. BETTS,
Atty. for Plff.

[Endorsed]: Filed Mar. 9, 1931. [40]

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney, United States Veterans Bureau, Seattle, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause, and which were

duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

That the Court erred in overruling defendant's objection to the introduction of Bureau ratings, they being defendant's Exhibit , on the ground that they were immaterial.

II.

That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. , on the ground that they were not properly identified, and on [41] the further ground that the government had no opportunity to cross examine the physicians who made the reports.

III.

That the Court erred in refusing to admit in evidence the personnel records of the Great Northern Railway and the report of physical examination made for the railroad by Dr. Flynn, they being defendant's Exhibit No. for identification.

IV.

That the Court erred in awarding judgment to the Administratrix of plaintiff's estate of insurance installments accruing subsequent to the veteran's death when there was no evidence offered to show that there was no designated beneficiary of said insurance.

V.

That the Court erred in failing and refusing to dismiss the second cause of action of plaintiff's complaint for want of jurisdiction, and on the further ground that the decision of the United States Veterans Bureau on such a compensation matter is conclusive, final, and not subject to jurisdictional review.

VI.

That the Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case and renewed at the close of all of the testimony, for the reason that plaintiff did not prove permanent and total disability of James W. Whitehead during the time his policy was in effect, to which denial of said motions defendant took exceptions, and exceptions allowed. [42]

VII.

That the Court erred in entering judgment in favor of plaintiff as the evidence was insufficient to sustain such judgment.

VIII.

That the Court erred in denying defendant's motion for a new trial, to which denial exception was noted by defendant.

IX.

That the Court erred in refusing to make and enter Finding of Fact No. III, proposed by defendant, which is as follows:

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of $10,000.00, designating no authorized person as beneficiary on said policy; that thereafter, there was deducted from his monthly pay as premium for said insurance the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

To which failure defendant noted an exception.

X.

That the Court erred in failing and refusing to make and enter Finding of Fact No. IV proposed by defendant, which is as follows:

That James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

To which refusal defendant noted exception. [43]

XI.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. V proposed by defendant, which is as follows:

That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

To which failure defendant duly excepted.

XII.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VI proposed by defendant, which is as follows:

That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

To which failure defendant noted exception.

XIII.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VII, proposed by defendant, which is as follows:

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November 31, 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the

beginning of permanent and total disability of said insured, July 27, 1921.

To which failure defendant noted exception.

XIV.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VIII, proposed by defendant, which is as follows: [44]

> That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages ranging from $5.11 a day to $6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

To which failure defendant noted exception.

XV.

That the Court erred in its failure and refusal to make and enter Finding of Fact No. IX proposed by defendant, which is as follows:

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

To which failure defendant noted exception.

XVI.

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. I proposed by defendant, which is as follows:

That the plaintiff is entitled to recover on either cause of action herein.

To which refusal defendant duly noted its exception.

XVII.

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. II proposed by defendant, which is as follows:

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

To which refusal defendant duly noted its exception. [45]

XVIII.

That the Court erred in making and entering plaintiff's Finding of Fact No. IV, which is as follows:

That during the period of service of the Deceased in the United States Army, he became

afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, by reason whereof he became entitled to receive from the Defendant the sum of $57.50 per month commencing on the said 20th day of November, 1918.

To which Finding Defendant duly entered its exception.

XIX.

That the Court erred in making and entering plaintiff's Conclusion of Law No. II, which is as follows:

That the Plaintiff is entitled to recover from the Defendant, United States of America, the sum of $57.50 per month commencing on the 20th day of November, 1918.

To the entry of which defendant duly entered its exception.

XX.

That the Court erred in denying defendant's motion to strike the testimony of witness Renche, on the ground that it was too indefinite, to which de-

nial the defendant duly entered its exception.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney,
U. S. Veterans' Bureau.

Received a copy of the within Assignment of Errors this 5 day of March 1931.

GRAHAM K. BETTS,
Attorney for Plff.

[Endorsed]: Filed Mar. 10, 1931. [46]

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore and on, to wit: the 17th day of December, 1930, at the hour of 4 o'clock P. M., the above entitled cause came regularly on for trial in the above entitled Court before the Honorable Jeremiah Neterer, one of the judges of said Court, sitting without a jury;

The plaintiff being represented by Graham Betts, Esq., her attorney and counsel;

The defendant, United States of America, being represented by Cameron Sherwood, Esq., Assistant

United States Attorney, and Erwin I. Burns, Esq., Special Attorney of the United States Veterans Bureau, its attorneys and counsel;

WHEREUPON, the following proceedings were had and testimony taken, to wit:

Mr. DeWOLFE.—The jury is waived by stipulation, which has been filed.

Mr. BETTS.—I drew up an amended complaint stating two causes of action; in the first cause of action I [47] omitted to allege disagreement; I filed a stipulation, the first cause of action was amended to include the disagreement.

Mr. DeWOLFE.—Disagreement as to the first cause of action. We admit disagreement as to the first cause of action, but deny disagreement as to the alleged revived insurance under Section 305 by means of uncollected and undue compensation.

The COURT.—Let the record show a disagreement is admitted as to the first cause of action.

C. R. CHRISTIE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is C. R. Christie, and I am employed by the United States Veterans' Bureau in Seattle. I have custody of the files of James W. Whitehead, deceased. I have a certified copy of his discharge.

(Testimony of C. R. Christie.)

Plaintiff's exhibit being certified copy of discharge, received in evidence.

I have a certified copy of this claimant's service record including the examination at enlistment, at discharge, treatment while he was in the Service, certified to by the Secretary of War. I have a rating sheet of the Board of Appeals dated January 1, 1922.

Plaintiff's exhibit No. 2 being rating sheet of January 1, 1922, offered in evidence.

Mr. BURNS.—I object to the introduction of that rating sheet as there is no rating properly admissible other than the last rating made by the Bureau, in that the Bureau has a right to change the ratings at any time. [48]

Mr. BETTS.—It goes to the question of arbitrariness of their change.

The COURT.—Admitted.

Mr. BURNS.—Exception.

Plaintiff's exhibit No. 3 admitted in evidence.

The COURT.—(Referring to plaintiff's exhibit No. 3). I don't think the Court ought to admit this. I will admit the examination upon which this was predicated, the medical examination.

Mr. BETTS.—I offer plaintiff's exhibit No. 4, being an examination by Dr. Burke dated August 26, 1921.

(Testimony of C. R. Christie.)

Mr. BURNS.—I object to the report of the examination in that the Government is deprived of its right of cross-examination by the introduction of the report and, moreover, that the examination contains a history as reported by the man, consisting of self-serving declarations.

The COURT.—Objection overruled. It is a Government document made by the Government.

Mr. BURNS.—Exception.

Plaintiff's exhibit No. 4 admitted.

I am familiar with the method of determining compensation. I am familiar with determining service connection of disability. There are numerous disabilities and various ways to determine service connection and no one method would apply to all disabilities. I am familiar with the files in this case. Service connection in this case was originally based upon a venereal disease which was found to exist in service, which was reviewed by the Rating Board, after claim for compensation had been filed and was held by the Rating Board that the condition had existed prior to the enlistment, as the records showed by the man's own statement and that the service had aggravated a pre-existing disability [49] and that service connection and compensation were allowed upon that reason. Service connection has since that time been denied. I have the order disallowing service connection.

(Testimony of C. R. Christie.)

Mr. BURNS.—The Government is willing to stipulate that he has been totally and permanently disabled since July 27th, 1921.

Mr. BETTS.—I will offer at this time plaintiff's exhibit No. 6, being a notification of reversal of the rating reinstating the insurance.

Mr. BURNS.—No objection.

Mr. BETTS.—I offer plaintiff's exhibit No. 7, being a rating issued showing the disability that plaintiff had and from which he died.

Plaintiff's exhibit No. 8 offered in evidence, same being final rating showing cause of death and disability from which he died.

Mr. BURNS.—No objection.

CARL A. WHITEHEAD, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Carl A. Whitehead and I am a brother of James W. Whitehead, deceased. I saw my brother the day after he got out of the army. He was nervous in his speech. He mumbled in his speech. He mumbled especially with the letter "l". It seemed he could not say the word. He was different. His mental attitude was bad. He would wander

(Testimony of Carl A. Whitehead.)
in his conversations and wouldn't hold to the conversation. I had lots of conversations with him. He would be talking along, and then get off on another subject entirely. I saw him quite frequently after that. He lost a lot of weight. He was losing weight all the time. I talked with him each time I saw him. Dr. Corson was treating him. He went to work a short time after [50] he got out of the army at his old job, switching for the Great Northern. This was the same position he had before he went in the service. I think he worked there from the fall of 1918 until the fall of 1920, but he did not work steady. He was sick part of the time. He tried to drive a truck for me but he could not do it. Once the engine was stopped and he called out and said the truck would not run. He was just dumbfounded. There was nothing the matter with the truck. He just failed to crank it. He didn't know what to do. He didn't work steady—just an hour or two, filling in with the work. I don't recall that he did any other work. He was very nervous. His difficulty in holding a conversation continued until the time he died. Towards the last he was terrible. He would stutter after he came back from the army. When he tried to say the word "letter", he couldn't say it at all—couldn't say anything with an "l" in it. That condition was peculiar to him after he came out of the service. It was only after he came out of the service. He did not have it before he went into service. I noticed it right after he first came out. He worked

(Testimony of Carl A. Whitehead.)

for me during 1919 for a few days when there was nothing doing on the railroad. Then he went back to the railroad. He was on the extra list. He wasn't working steady. He couldn't say a word plain. He stuttered. He was never like that before.

Cross Examination by Mr. BURNS.

I am familiar with the signature of my brother. I would say that is his writing.

Mr. BURNS.—These are payrolls of the Great Northern Railroad Company.

Mr. BETTS.—I admit that those are his railroad payroll records.

Records marked defendant's exhibit A. [51]

That paper contains the signature of my brother.

Mr. BURNS.—This document is application for employment with the railroad company of James Whitehead. My brother worked for the railroad company before he went into the service. He went back to his old job upon discharge. He did not work steady up to 1920.

Re-direct Examination by Mr. BETTS.

He was an officer of the switchman's union either before or after service.

H. W. DONAHUE, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is H. W. Donahue. I was employed by the Great Northern Railroad Company at the time Mr. Whitehead was—1918, 1919 and 1920. I knew Mr. Whitehead. He went back to work as soon as he was discharged from the army. I do not know how long he continued to work. He was working extra as a switchman. Sometimes he worked two or three times a week, and sometimes a whole week. The oldest men on the road had the preference. When he came out of the army I noticed he was not the same Jim Whitehead because he was my partner. He and I roomed together and chummed together before he went into the service, while he was selling newspapers, and I am acquainted with his parents. He worked practically two weeks on and off after he got out of the army. He could not work steady on account of sickness. He acted like a man that was demented. It commenced right after he came out of the service. I asked him to cut out some cars and gave him a slip of paper and he brought out the wrong cars. That was during November, about November 10th or 12th. That was my first inkling that he was not right. That was five or six days [52] after he came out of the service. His conduct in the employ was very good. He acted kind of hesitating. He would hesitate when you

(Testimony of H. W. Donahue.)

would tell him anything. He would wander off in conversation at random. He did not execute his orders very well. When I would tell him to bring out a certain car, sometimes he would bring it out, and sometimes he would not. I noticed when he first got out of the service he hesitated when he talked. I had many conversations with him day in and day out. He would jump off each subject from one thing to another. It might have been a year after he got out. I was out to his house for Sunday dinner—a lovely chicken dinner. He started crying, saying there was nothing fit to eat, complaining that all his mother gave him was "this same old beef", when it was chicken. He was working under me most of the time he was with the railroad. A crew consists of three men—the foreman and two helpers, and usually they spread out, doing the work. We would send one man here and another man here, and another man there. He did his work after a fashion. He was not the same switchman as far as efficiency as before. He would not pick up the right cars. I couldn't trust him. I was never sure of him. I am an engine foreman, of the switch engine crew.

Cross Examination by Mr. BURNS.

My duties as a foreman of the switching crew were switching cars. I was in charge of a crew made up of two men and myself. Mr. Whitehead was night foreman for a part of the time as extra. I don't think he was foreman ten nights in his railroad ca-

(Testimony of H. W. Donahue.)

reer. He was required to do the same duties that I did when he was foreman. The oldest man in the service is given the preference. The jobs are not given because of ability. He worked not to exceed two [53] years prior to the war. I got him his position. Efficiency and skill and ability mean no more on the Great Northern than on any other railroad. It is merely how long a man has been in the service. That is why I am foreman. It is not a case of my ability. The railroad did not issue credit and demerit reports. They censured you, but never gave you credit. I know that Whitehead got demerits before the war. Ability has no bearing on it whatsoever. Those are credits given Mr. Whitehead on July 1st, 1920, and January 1st, 1921. I didn't get any credits—I got demerit marks. The superintendent rated the letters. I noticed nothing wrong with him before he went in the service.

W. H. HORTON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is W. H. Horton. I knew James Whitehead during his lifetime. I worked with him as a switchman. I saw him when he came back to the Great Northern after his discharge. I do not know the exact date. I noticed that he was not the same,—his hesitant motion to take care of his work. This

(Testimony of W. H. Horton.)

manifested itself on several occasions. I was foreman of another crew at Smith's Cove. It was very important that you cut in the correct car to the ship. At different times he would get into awful jangles as to the work not being done and Jim would feel bad about it. He would know after I would call him about the mistakes. He would feel bad about it and become sulky. I worked with him before and after the war. On one occasion I very nearly had a serious accident on a passenger train in throwing the [54] wrong switch in allowing some cars to go on the main line. It was just a miracle we stopped the passenger train. He was not responsible in different ways. Being a Brother, we would overlook all these things, instead of turning him in to the officials. He would do the work and have everything come out well. There were three of us on the ground, five in the crew. He was on the ground crew. The rest of the men helped him with his work. I don't remember when he let the freight car on the main line—it was quite a while after he came out of the service. It was some time before he went out of the employ. He would not carry his conversation very long. When you instructed him at his work he would get out of his tracks and go onto something else instead of paying attention to what he was being told. He would go away mumbling to himself.

Cross Examination by Mr. BURNS.

I was doing the same work the insured was doing. I worked along with him. I made no record of this

(Testimony of W. H. Nichols.)
incident I spoke of. I worked with Mr. Whitehead all his time before the war and after the war at different intervals. He would sometimes work with me and sometimes with the other men. The Great Northern would issue credit slips for skillful work.

W. H. NICHOLS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is W. H. Nichols. I knew James Whitehead. I was working with him on the Great Northern railroad, off and on after he came back from the army. I saw him very shortly after he came back. I was engine foreman—switching [55] engine work. He would mumble and seem to be nervous and unstable at times—more so than at others. I can't say yes or no that I noticed anything peculiar about his speech. It was quite a time ago. I never paid much attention. I never talked with the men except to tell them what to do. He did his work at times very well. At other times he was not there. You could not depend upon him. Sometimes he would do it and sometimes he would not do it right at all.

MRS. JESSIE SMITH, called as a witness in her own behalf, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Jessie Smith and I am the plaintiff in this action. I am the mother of James W. Whitehead, and the administratrix of his estate. I saw him the day or day after he came back from the army at my home. He was smaller than when he went away. He was unstable in his speech. He was lost for about three weeks after his discharge papers came. He would write to me and state "you didn't get me out of this, if you don't get me out of this I will commit suicide." He would talk so loud, and sometimes he would be in the house days and never talk at all, and when he would talk, it would be excitedly. He stammered. He lived with me three or four months after he was out of the army. They called him "Goofy". I don't remember whether he worked regularly every day on the railroad. He was married and his wife lived there. He used to go to my mother's and stay back and forth. He would talk a whole string of stuff to me when he came home after work on the railroad. He was killing time and sometimes he would go back to town. I asked him to go home and go to bed. He couldn't sleep. He would kill time at home until his wife got off from [56] work, sometimes after midnight. I saw him at Sequim. That was in July, 1920; I think that was the

(Testimony of Mrs. Jessie Smith.)

year. I could not talk to him—I was afraid of exciting him. He went to work and scrubbed out the bathroom, and then he would scrub it again. He did this some four or more times after he got out of the army. The morning he went to Steilacoom he went in to scrub up the bathroom. He was committed to Steilacoom Hospital for the feebleminded in July, 1921.

Cross Examination by Mr. BURNS.

I cannot identify my son's signature on defendant's Exhibit A.

DR. ROYAL B. TRACY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination by Mr. BETTS.

My name is Royal B. Tracy. I am a graduate of the University of Louisville, 1908. I am a physician —a specialist in nervous and mental diseases.

Mr. BURNS.—Qualifications admitted.

Paresis is a disease of the nervous system—a paralysis—particularly the brain tissue at first. It is a condition in which the individual has a softening of the brain, so that he has a scanning or stuttering speech. He becomes obtuse mentally, and becomes worse as the disease progresses. It lasts from three to seven years before death. He becomes mentally duller all the time. Ater a time they develop delu-

(Testimony of Dr. Royal B. Tracy.)

sions of grandeur. They imagine they have a million dollars when they have nothing in the bank; and other delusions of the reverse. This is caused by destruction of the sensation fibers of the brain. [57] Syphilis is the cause of paresis. All syphilitics do not get paresis. Paresis usually comes to the mentally alert. Syphilis attacks the nervous system that is the most active. If he is just an ordinary workman the chances are that he will have syphilis of the spinal cord. If he is mentally alert, the chances are that it will attack the brain. There is a possibility that he will have meningeal syphilis, but in all syphilis there is some inflammation of the brain cells. Syphilis is an infectious disease and hereditary also. The medical profession has not decided whether there is any difference in a development of paresis from syphilis whether it is infectious or hereditary. There is a disagreement as to that, if a person has had infectious syphilis and paresis develops when it is shown that the paresis developed from seven to ten years after the infection. If a person should have an injury of any kind or undergo an operation, the shock might start the syphilis which had been latent. I am not prepared to say that a triple typhoid inoculation would be such as to cause this. I have known a spinal puncture to cause it.

Mr. BETTS.—Assuming a history of a man being all right before he goes into the army, and while he was in the army he has a triple typhoid inoculation

(Testimony of Dr. Royal B. Tracy.)
and a spinal puncture and he is afterwards confined to the hospital until his discharge and is given an S. C. D. discharge for nervousness, and thereafter immediately returned to his former employment, and persons close to him immediately upon his discharge notice that his speech had changed so that he stuttered, particularly in such words as "ladder", that he mumbled and was not logical in his train of thought, that he couldn't keep up a train of conversation, that he was [58] at that time unable to execute orders in his employment that he had theretofore been able to execute, and that this condition progressed so that he became more irrational and more unstable, and that a year afterwards he didn't know chicken from beef, that he was two and one-half years after his discharge hospitalized and diagnosed as general paresis, and died some months after that,—can you formulate an opinion as to when that began?

Mr. BURNS.—I object to that hypothetical question on the ground that it does not state all the facts, that he misstates the facts. The question assumes that he was in good condition, when the record shows that he was treated for gonorrhea and syphilis while in service and immediately after his enlistment. The question does not include that he worked continuously for two years; and it also includes the statement that he didn't know beef from chicken.

The COURT.—Include the fact that he worked for approximately two years.

(Testimony of Dr. Royal B. Tracy.)

Mr. BURNS.—Exception.

My opinion would be that he had paresis from the time that he came back. I say that the man, no doubt, in my mind, had a general paresis when he was discharged from the army, from the history of the case that has been given, and from the testimony these people have given. There is no doubt in my mind that it was general paresis and that it occurred some two or three years before that, and that this has been just the evidence manifesting itself toward the final dissolution of the man. The paresis had already occurred and was in progress at the time he was discharged. I believe that administration of a triple typhoid inoculation and spinal puncture did [59] aggravate the paresis. I have treated many syphilitic paresis cases. Work is likely to increase it, and make it run a more rapid course.

Cross Examination by Mr. SHERWOOD.

Q.—Assuming that this man had worked with the railroad company for two years at least prior to entry into the service, and soon after entry into service he was found to have syphilis and gonorrhea, that he was discharged without gonorrhea and syphilis, that he worked for two years, 1918 to 1920, as switchman on the railroad, doing the same work as other men engaged in the same employment for that period, that he showed some hesitancy of speech at some time during that period, and that he later was classified as totally and permanently disabled—

(Testimony of Dr. Royal B. Tracy.)

paresis, and died of paresis superinduced by syphilis, and assuming also as a part of the question, that he was examined in 1921, and diagnosed insomnia and intestinal enteritis, with no indication of paresis at that time; and assuming further the facts as stated by Mr. Betts, and that in addition he was examined on seven different dates from July 10 to September 24, 1920, by a reputable physician who certified at the time that he was suffering from intestinal enteritis and insomnia only, would you still say he was suffering from paresis at the time of his discharge in 1918?

A.—I am sure he suffered from paresis at the time he came out of the army, from the evidence.

Mr. BETTS.—The plaintiff rests.

Mr. BURNS.—At this time the Government moves for a non-suit with reference to the first cause of action on the ground that the evidence clearly shows that this [60] man was not totally and permanently disabled at any time while the insurance contract was in force and effect, but, on the contrary, shows that this man did work continuously for a period of two years, that he returned to his pre-war occupation immediately following discharge and continued for two years; that he made substantial earnings during that period of two years, and there is no medical evidence to establish tuberculosis in this case, and that is the one disability claimed.

With reference to the second cause of action, we move for a non-suit, in that there is nothing to show

(Testimony of Dr. Royal B. Tracy.)

that this man had compensation due him at the time of the lapse of the insurance, or that he was entitled to compensation at the date of death, or total and permanent disability, and these things must be shown in order to entitle the plaintiff to recover under section 305.

The COURT.—You may renew the motion after you get through with all the evidence.

Mr. BURNS.—Exception.

DENNIS O'HEARN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

My name is Dennis O'Hearn. I worked for the Great Northern, as Chief Clerk in the Superintendent's office. As such I have custody of the payroll records of the Great Northern. Defendant's exhibit A are the original payrolls. Mr. Whitehead was paid in November, 1918, 48 hours, 64¢ an hour, $30.70. In December, 1918, Mr. Whitehead worked 240 hours, for which he was paid [61] $153.80. In January, 1919, Mr. Whitehead was paid $148.50, working 232 hours. In February, 1919, he was paid $102.40, working 160 hours.

A 31-day month has 248 hours—eight hours a day. February was a 28-day month.

(Testimony of Dennis O'Hearn.)

During March, 1919, he earned $128.15, working 215 hours. During April, 1919, he was paid $138.60, working 246 hours. During May, 1919, he was paid $133.15, working 208 hours. In June, 1919, he was paid $112.60, working 176 hours. During July, 1919, he was paid $143.35, working 208 hours. He was paid the same rate as other men in the same capacity. During the month of August, 1919, he was paid $97.30, working 152 hours. During September, 1919, he was paid $133.90, working 26 days, or 208 hours, and 30 minutes overtime. During October, 1919, he was paid $161.15, working 30 days, and one-half hour overtime. That was a full month. During November, he was paid $157.55, working 30 days and one hour overtime. He was employed during November for thirteen days as night foreman. During December, 1919, he was paid $150.65, working 28 days and several items of overtime, aggregating 225 minutes overtime. During January, 1920, he was paid $145.20, working 28 days. During the month of February, 1920, he was paid $117.50, working 23 days. During the first half of March, 1920, he worked ten days as a switchman, four days as a foreman, and earned $72.75. The rest of the month of March is not in the records for some reason or other. He was paid $84.10 for the rest of March, or 16 days, and 2 1-12 hours overtime. During the last half of March he worked one night as foreman. During April, 1920, he earned $151.15, working 29 days. He was employed 9 days of that time as fore-

(Testimony of Dennis O'Hearn.)

man. During May, 1920, he was paid [62] $119.10, working 23 days and 110 minutes overtime. During June, 1920, he was paid $133.85, a total of 26 days, and one hour overtime. The second half of July does not seem to be in here—only the first half of July. He worked 10 days and earned $51.35 during the first half of July. I cannot tell whether he was on vacation the last half of July. In August, 1920, he was paid $188.55, working 29 days, with 30 minutes overtime. His salary was increased during August, 1920, the increase applying to everybody. He was paid $149.00 in September, 1920, working 23 days. During October, 1920, he was paid $156.85, working 24 days and 65 minutes overtime. During the month of November, 1920, he was paid $114.10, working 16 days and 20 minutes. I have no record showing that he worked after November, 1920. Defendant's Exhibit A-1 is the original Personal Records file showing when he went to work and that he filled out a record.

Cross Examination by Mr. BETTS.

The record begins November, 1915, and was closed October 25, 1921. The record begins with the employee himself, the original record. It starts with the application for employment showing his service previous to entering the service of the Great Northern for a period of five years. If he is laid off for any reason or on vacation, or reduction of force, the form is made to that effect, as it is if he

(Testimony of Dennis O'Hearn.)

is promoted or commended. The superintendent on the division makes these records.

Mr. BURNS.—(Offering defendant's exhibit A-1, being personal history record of service of James W. Whitehead with the Great Northern Railway.) I wish to offer this as showing that an examination was given this man prior to [63] or on employment after his discharge, and in the employment as showing that the man was commended as a splendid worker throughout the period of employment, and as showing whether or not he suffered from ill health during this period. What his condition was during this time.

The COURT.—We are not concerned with him prior to his enlistment. This commenced in 1917.

Mr. BURNS.—Except that evidence was offered by the plaintiff to show that he was capable of carrying on prior to his enlistment and that his condition changed afterwards, and also indicated that he had not done his work properly. These records will show there was criticism of his work prior to his entry into service and that, on the contrary, after his discharge he was commended.

The COURT.—Denied. Exception noted.

Mr. BURNS.—I will offer this record as it pertains to this man from November, 1918, to 1921.

Mr. BETTS.—Objection, as incompetent, irrelevant and immaterial and because it was made up by persons unknown to plaintiff.

(Testimony of Carl A. Whitehead.)

The WITNESS.—The original record is made by the employee himself, which is the foundation of the file. I wasn't on the division at that time.

Mr. BETTS.—I object.

The COURT.—Sustained.

Mr. SHERWOOD.—The signature of Mr. Whitehead has been identified by the brother.

The WITNESS.—I do not personally know James W. Whitehead's signature.

The COURT.—Any statement that he signed would be admissible.

The COURT.—I do not know that the brother identified the signature.

Mr. SHERWOOD.—We had the brother identify it [64] as his signature.

The COURT.—Not that I know.

CARL WHITEHEAD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

I would not want to say that is my brother's signature on Ex. A-3. It is different than the other two. The writing is different.

Mr. BETTS.—Objection as incompetent, immaterial, irrelevant and not identified.

The COURT.—Sustained.

DENNIS O'HEARN, recalled as a witness on behalf of the defendant, testified as follows on

Direct Examination by Mr. BURNS.

Those records are made up in the office. They are made up from time cards sent in from the yard. Those time cards would not show if the other men were helping him with the work.

W. T. FLYNN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination by Mr. BURNS.

I am a physician and surgeon and have been engaged as such since 1905. (Qualifications admitted by Mr. Betts.) I am employed by the Great Northern railroad. That is my signature on defendant's exhibit A-3. Whoever I examined signed it. I don't recall Mr. Whitehead. I do not know his signature. I examined the man of whom this paper is made up, and this is a report of my examination. [65]

Mr. Burns offers defendant's exhibit A-3, being the report of examination of Dr. Flynn dated March 31, 1919.

Mr. BETTS.—I object as incompetent, irrelevant and immaterial and Doctor has no recollection of examining the man.

Mr. BURNS.—It contains the doctor's signature and he stated it was signed in his presence.

(Testimony of W. T. Flynn.)

The COURT.—He has no recollection of the man, does not know that he signed it. If he has no personal recollection of what he found, and unless it can be definitely shown that that man signed it, and made the representations, and endorsed the certificates, I could not admit it.

Mr. SHERWOOD.—Hospital records are always admissible.

The COURT.—This is not a hospital report.

Mr. SHERWOOD.—Virtually the same.

Mr. SHERWOOD.—I would like an exception.

Mr. BURNS.—The defendant rests.

Mr. BURNS.—The Government moves for a dismissal of the complaint on the ground of total failure of proof tending to show a total disability of the deceased at the date of discharge, November, 1918. On the contrary, the evidence shows an ability to carry on continuously in a substantially gainful occupation over a period of approximately two years, during which he earned the same sums as employees engaged in the same occupation; and the burden being upon the plaintiff, there is a total failure of proof; and we also move for judgment on behalf of the United States, and move for a non-suit on the same grounds, and renew our motion made at the close of the plaintiff's case as to both causes of action. And a further matter: At the time the non-suit was granted, costs were assessed in the [66] sum, I believe, of $67.90, which have not been paid. If any judgment is granted I would like to have that set off.

(Testimony of W. T. Flynn.)

Mr. BURNS.—I would like an exception to the denial of motions at this time.

DECISION OF THE COURT.

The COURT.—I think I can dispose of this as well now as at any time. The records and proofs show beyond any doubt that the deceased enlisted in the army July, 1918, and that he was discharged November 20, 1918; that he was committed to the insane asylum July, 1920, and that he died September 30, 1921.

The evidence shows that at the time the deceased was discharged it was recorded that he was suffering from a nervous disease. The particular affliction, if there was any particular affliction, is not noted in the discharge; and the evidence submitted, if believed, and there is no reason for the court to disbelieve it, from the witnesses who have testified, that upon arriving at home he was nervous, mumbling in his speech, could not hold a conversation, his conversation would roam,—pass from one subject to another; that he lost weight; that he tried to drive a truck in the employ of his brother; that he was unable to do the work for some reasons that were not fully disclosed in the evidence; that he was employed by the Great Northern Railway Company as switchman from November, 1918, until November, 1920, for a very large portion of the time, cov-

ering a period of twenty-five months. During that time he worked some three or four months—possibly [67] four, or five whole months, and the other months he worked a greater part of the month; he received the same wages that were paid to other employees in like work. In this employment he worked, with very few exceptions, with and under foremen who were personally friendly to him—one who had been a very intimate friend for fifteen years, or more, a roommate for a large portion of the time in the city of Seattle. The testimony is that while the now deceased was employed and was paid the regular compensation during that time, he was unreliable. He could not perform the duties that were entrusted to him; he could not remember cars; made mistakes in numbers of cars, and in places for switching cars. On one occasion he switched a number of cars out on the main line of the railway in endeavoring to carry out some other order. This foreman testified, and another foreman and a switchman, that they relieved him from the work and carried him along, because he belonged to the union, and never made any complaint to the officers of the company, because they did not want him to lose his position. One of the foremen testified that he did not have much recollection of the man except that he could not be relied upon and made mistakes. The evidence shows that while he was foreman of the switching gang, at one time nine days, and sometimes two or three days at a time, this was not because of merit, because under

the rules of the Union, a person is promoted according to the length of service—seniority of service will cause the promotion rather than proficiency in the work. The testimony of these witnesses is corroborated by the conduct of the deceased when he was off work,—the scrubbing of the bathroom some five or six times, as testified to by the mother; and likewise, his conduct in crying at the table at his [68] home and complaining of the splendidly prepared chicken by expressing disgust that he was served with the same old beef stew; and from the testimony I am convinced that the deceased could not, of his own ability, have held any position that would have given him a substantially gainful renumeration; and I have not any question in my mind that, but for the action of his co-workers in carrying him along in the fashion they did, and concealing his conduct on the job, he would not have been permitted to remain on the job. He was a dangerous man and ought not to have been there; and then that, following along with his commitment to the insane asylum where he died, and the testimony of the doctor—the medical testimony, which shows that he was suffering from a nervous, mental disease—paresis—there can be no doubt that he was totally and permanently disabled because of this condition from the date of his discharge. I don't think there is any other conclusion to arrive at, but that he was totally and permanently disabled, from the testimony shown here, from the date of his discharge.

As to the second cause of action: From what I have said, it isn't necessary to say anything upon the second cause of action, but I would like to make this observation as to the second cause of action. There isn't any testimony before the Court of any irregular conduct on the part of the deceased which would bring about the condition for which he was treated. I don't know just what the record shows —I have not examined it. If this condition was in his system at his enlistment, and if the Government position is true—but the presumption is that he was free from anything of this sort, and there is no evidence that he was, except [69] some statement that says that there was some scab on the end of his penis, but, being accepted, the Government is bound. He is presumed to be—to have been, all right. There is no evidence that he did anything to bring about any condition of syphilis; and if it was in his system, there was something to aggravate it—whether it was aggravated, the Court is unable to say, nor is it necessary; and as to his misconduct in service and in the absence of proof, the presumption would be that his conduct was good—the presumption would be in his favor.

I think a judgment must follow in favor of the plaintiff.

There should be a credit to the Government as to the costs assessed against him in the former case.

Mr. SHERWOOD.—I think they are sixty-seven dollars and some cents.

The COURT.—Whatever it is.

Mr. SHERWOOD.—The Government excepts to the Court's findings and judgment on the ground that there was failure of proof of total and permanent disability at the time of discharge; and also, excepts to the Court's decision and failure to grant the motion of the Government for judgment at the conclusion of all the evidence.

The COURT.—I will make this observation. You can prepare the further findings of fact. It will be that a disagreement was had. You can prepare the order.

Mr. BETTS.—Disagreement was stipulated.

Mr. BETTS.—The originally named beneficiary was joined as a party defendant, and she not having answered, I would like default against her.

The COURT.—Make the proclamation. You should have had that done. [70]

Mr. SHERWOOD.—Also, the Government excepts to the Court's denial of the motion for judgment on the second cause of action on the ground there is no proof of disagreement.

The COURT.—You can prepare these findings and present them right soon so the matter won't be suspended indefinitely.

(Default entered against the originally named beneficiary.) [71]

WHEREUPON, within the time limited by law and after the conclusion of the trial herein, defendant, in writing, requested the following proposed Findings of Fact and Conclusions of Law, which the Court refused to give:

FINDINGS OF FACT.

I.

That the plaintiff is the duly qualified and acting administratrix of the estate of James W. Whitehead, deceased, having been appointed as administratrix of said estate in Seattle, King County, Washington; that the plaintiff is now a resident of Seattle, Washington; that the plaintiff is the mother of the deceased, and at the time of his death, and prior thereto, was wholly dependent on him for support.

II.

That James W. Whitehead enlisted for military service with the United States Army in the month of July, 1918, and was honorably discharged therefrom on the 20th day of November, 1918.

III.

That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of $10,000.00, designating no authorized person as beneficiary on said policy; that thereafter, there was deducted from his monthly pay as premium for said insurance the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof, the defendant agreed to pay said James W. Whitehead the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to

his estate, and that the premiums were paid thereon to November, 1918, only. [72]

IV.

That said James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

V.

That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

VI.

That James W. Whitehead became totally and permanently disabled on July 27, 1921.

VII.

That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for non-payment of premiums November *31,* 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November *31,* 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

VIII.

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to-wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to-wit, wages [73] ranging from $5.11 a day to $6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

IX.

That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

X.

That a judgment for costs in the sum of $67.90 in cause Number 12140 in the above entitled Court remains unsatisfied by plaintiff herein, and is a proper offset against any judgment obtained by plaintiff in this cause.

CONCLUSIONS OF LAW.

I.

That the plaintiff is entitled to recover on either cause of action herein.

II.

That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

WHEREUPON, after the Court refused to give and make the proposed Findings of Fact and Conclusions of Law, the defendant duly filed herein its Exceptions to the Court's refusal to make and enter such Findings of Fact and [74] Conclusions of Law, which Exceptions are as follows:

I.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. I.

II.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. II.

III.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. III.

IV.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. IV.

V.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. V.

VI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VI.

VII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VII.

VIII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. VIII.

IX.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. IX.

X.

Defendant excepts to the refusal of the Court to make and enter defendant's requested Findings of Fact No. X. [75]

XI.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. I.

XII.

Defendant excepts to the refusal of the Court to make and enter defendant's requested conclusion of law No. II.

WHEREUPON, the following Findings of Fact and Conclusions of Law submitted by the plaintiff were made and found by the Court:

I.

That the deceased, James W. Whitehead, enlisted for service in the United States Army in July, 1918, and was honorably discharged therefrom on the 20th day of November, on a surgeon's certificate of disability.

II.

That during the plaintiff's military service, he applied for and was granted a policy of war risk insurance of $10,000.00, and premiums were paid thereon during his service in the United States Army.

III.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of James W. Whitehead, deceased, in Seattle, King County, Washington.

IV.

That during the period of service of the deceased in the United States Army, he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, in the State Insane Asylum, by reason [76] whereof he became entitled to receive from the de-

fendant the sum of $57.50 per month commencing on the said 20th day of November, 1918.

V.

That on said date of discharge, to wit: November 20th, 1918, the policy of insurance herein sued upon was in full force and effect.

VI.

That a judgment for costs in the sum of $67.90 in a cause number 12140 in the above entitled Court remains unsatisfied by the plaintiff herein and is a proper offset against plaintiff's judgment herein.

VII.

That the defendant, Lilly Gladys Whitehead, was duly and regularly served in this action by publication made in the manner provided by order of this Court made and entered on the 15th day of April, 1930.

VIII.

That the defendant, United States of America, has disagreed with the plaintiff as to her claim.

CONCLUSIONS OF LAW.

I.

That the Court has jurisdiction of the parties and of the subject matter of this action.

II.

That the plaintiff is entitled to recover from the defendant, United States of America, the sum of

$57.50 per month commencing on the 20th day of November, 1918.

WHEREUPON, after the Court made and entered the Findings of Fact and Conclusions of Law submitted by [77] plaintiff, defendant duly filed herein its exceptions to the Court's making and entering of such Findings of Fact and Conclusions of Law, which exceptions are as follows:

I.

Defendant excepts to Finding of Fact No. IV on the ground that there was no competent proof tending to show that deceased became afflicted with paresis during the period of service in the United States Army, and that there was no competent proof tending to show that deceased was totally and permanently disabled from following continuously any substantially gainful occupation at the time of discharge from the United States Army on November 20, 1918; and on the further ground that the uncontroverted evidence adduced at trial showed that said decedent was, for a period of two years immediately after discharge from the United States Army, able-bodied, and that he carried on continuously a substantially gainful occupation, to wit: that of switchman and switch foreman, earning the same wages and doing the same work as others engaged in like occupations at the same time.

II.

Defendant excepts to Conclusion of Law No. II as made by the Court on the ground that there was

no evidence upon which to base such a conclusion of law; the evidence, on the contrary, showing that plaintiff is not entitled to recover from the defendant, United States of America, in the sum of $57.50 per month, or any other sum whatsoever.

Exceptions hereinabove noted, allowed. [78]

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions may be settled, allowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within Proposed Bill of Exceptions this 11th day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff. [79]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

The above case coming on for hearing on application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same together with exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions; and the parties hereto having stipulated and agreed upon said bill; the Court being duly advised, it is by the Court

ORDERED that said bill of exceptions be, and it hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this Court who pre- [80] sided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that the Clerk of this Court attach all of the exhibits in this cause

to said bill of exceptions, making the same a part hereof.

DONE in open Court this 23rd day of March, 1931.

JEREMIAH NETERER,
United States District Judge.

O. K.

GRAHAM K. BETTS,
Attorney for Plaintiff.
CAMERON SHERWOOD,
Asst. U. S. Atty.

[Endorsed]: Filed Mar. 23, 1931. [81]

(Title of Court and Cause.)

PROPOSED ADDITIONAL ASSIGNMENT OF ERROR.

Comes now the United States of America, defendant herein, and by Anthony Savage, United States Attorney, Cameron Sherwood, Assistant United States Attorney for the Western District of Washington, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, makes the following proposed additional assignment of error herein:

I. That the Trial Court erred in entering judgment in favor of the plaintiff in violation of the provisions of Section 300 of the World War Veterans Act and United States Code Annotated, Title 38, Section 511, in that Lilly Gladys Whitehead was

the only beneficiary designated in the policy of insurance herein sued upon.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney,
U. S. Veterans Bureau.

Copy received this 29th day of Mar. 1931.
GRAHAM K. BETTS,
Atty. for Plff.

[Endorsed]: Filed Mar. 30, 1931. [82]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On the application of the defendant herein it is hereby

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 29th day of December, 1930, be, and the same is, hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

DONE in open Court this 9 day of March, 1931.

NETERER,
United States District Judge.

Received a copy of the within Order this 5th day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plff.

[Endorsed]: Filed Mar. 9, 1931. [83]

(Title of Court and Cause.)

STIPULATION.

It is hereby STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have an extension of time to and including June 1, 1931, in which to file its record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit; and

It is further STIPULATED that the present term of court may be deemed to be extended for that purpose.

DATED at Seattle, Washington, this 6.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed April 6, 1931. [84]

(Title of Court and Cause.)

ORDER

Upon application of the complainant herein, and pursuant to stipulation of both parties, it is hereby

ORDERED in the above entitled action that the defendant may have an extension of time to and including June 1, 1931, in which to file its record on appeal herein in the United States Circuit Court of Appeals for the Ninth Circuit; and it is

FURTHER ORDERED that the present term of court may be deemed extended for that purpose.

DONE in open Court this 6 day of April, 1931.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within Order this 6th day of April, 1931.

GRAHAM BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 6, 1931. [85]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Amended Complaint.

Answer to Amended Complaint.

Reply.

Stipulation waiving jury trial.

Judgment.

Stipulation and Order extending time for lodging and settling proposed Bill of Exceptions to March 1, 1931.

Motion for New Trial.

Order Denying Motion for New Trial.

Findings of Fact and Conclusions of Law (Plaintiff).

Findings of Fact and Conclusions of Law (Defendant).

Exceptions of Defendant to Court's Failure to make and enter Findings of Fact and Conclusions of Law proposed by Defendant.

Exceptions to Findings of Fact and Conclusions of Law as made and entered by the Court.

Stipulation and Order allowing defendant to March 20th to lodge and settle Bill of Exceptions.

Notice of Appeal.

Petition for Appeal.

Assignments of Error.

Order Allowing Appeal.

Citation on Appeal.

Original exhibits both offered and omitted.

Copy of this Praecipe.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.

Received a copy of the within Praecipe this 11 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plff.

[Endorsed]: Filed Mar. 12, 1931. [86]

(Title of Court and Cause.)

To the Clerk of the above-entitled Court:

You will please issue and include as part of transcript of record above cause to be certified to U. S. Circuit Court of Appeals additional Assignment of Errors heretofore filed herein, and a copy of this praecipe.

CAMERON SHERWOOD,
Asst. United States Attorney.

Received a copy of the within Praecipe this 1st day of April, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed April 1, 1931. [87]

(Title of Court and Cause.)

ADDITIONAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the documents listed below.

Minute entry showing default of additional party defendant.

Petition for joinder of additional party defendant.

Order joining additional party defendant.

Affidavit of publication of summons on additional party defendant.

Copy of this Praecipe.

Stipulation and order extending time and term for lodging record on appeal.

ANTHONY SAVAGE,
United States Attorney,
CAMERON SHERWOOD,
Asst. United States Attorney.

Received a copy of the within Praecipe this 6th day of April, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 6, 1931. [88]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of the above-entitled Court:

You will please issue supplemental transcript of record as follows:

(1) Minute entry of motion for default against the defendant Lilly Gladys Whitehead.

(2) Minute entry of Order of default against the defendant Lilly Gladys Whitehead.

(3) This praecipe.

GRAHAM K. BETTS,
Atty. for Plaintiff.

[Endorsed]: Filed May 5, 1931. [89]

(Title of Court and Cause.)

PRAECIPE

To the Clerk of the above-entitled Court:

You will please issue supplemental transcript and certify to the Circuit Court the following:

(1) Motion and affidavit for publication of summons against defendant Lilly Gladys Whitehead.

(2) Order for Summons by publication against defendant Lilly Gladys Whitehead.

GRAHAM K. BETTS,
Atty. for Plaintiff.

[Endorsed]: Filed May 19, 1931. [90]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Western District of Washington—ss.

I, Ed. M. Lakin, Clerk of the above entitled court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 90, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause except Reply to Answer to Amended Complaint which has been lost and no copy thereof substituted in the record, and (except captions etc. where omitted) as is required by praecipes of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to wit:

Clerk's fees (Act Feb. 11, 1925) for making certificate, record or return 266 folios, at 15c	$39.90
Appeal fee, (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record,	.50
Certificate of Clerk to Original Exhibits	.50
Total,	$45.90

[91]

I hereby certify that the above cost for preparing and certifying record, amounting to $45.90, has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, this 26 day of May, 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court,
Western District of Washington.
By E. W. PETTIT,
Deputy [92]

(Title of Court and Cause.)

CITATION ON APPEAL

United States of America,
Western District of Washington—ss.
Northern Division.

The President of the United States to JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased, plaintiff, and GRAHAM K. BETTS, her attorney:

YOU, and EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, on the 10th day of April, 1931, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final judgment signed and filed on the 29th day of December, 1930, wherein the United States of America is defendant, and Jessie Smith, Administratrix of the Estate of James W. Whitehead, is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable Jeremiah Neterer, United States District Judge for the Western District of Washington, Northern Division, this 9 day of March, 1931.

[Seal] JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Mar. 9, 1931. [93]

Received a copy of the within Citation on Appeal this 5 day of March, 1931.

GRAHAM K. BETTS,
Attorney for Plaintiff. [94]

[Endorsed]: No. 6484. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jessie Smith, Administratrix of the Estate of James W. Whitehead, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 1, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Title of Court and Cause.)

STIPULATION CONCERNING PARTS OF RECORD TO BE PRINTED.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the appeal herein is based upon the assignment of error marked as Defendant's Proposed Additional Assignment of Error, contained in the original record at page 82 thereof, and that for the purpose of this appeal only the following parts of the record shall be printed:

1. Amended Complaint, record page 1.

2. Answer to Amended Complaint, page 5.
3. Petition for joinder of additional party defendant, page 9.
4. Order granting petition for joinder of additional party defendant, page 11.
5. Motion and Affidavit for an order of publication of summons against defendant Lilly Gladys Whitehead, page 12.
6. Order for publication of summons, page 14.
7. Publisher's affidavit of publication of summons, page 15.
8. Order of Default against defendant Lilly Gladys Whitehead, page 18.
9. Assignments of Error, page 41.
10. Defendant's proposed additional Assignment of Error, page 82.
11. Findings of Fact and Conclusions of Law, page 26.
12. Exceptions to Findings of Fact and Conclusions of Law, page 19. [95]
13. Defendant's proposed Findings of Fact and Conclusions of Law, page 19.
14. Exceptions to refusal of defendant's proposed Findings of Fact and Conclusions of Law, page 24.
15. Judgment, page 31.
16. Motion for New Trial, page 33.
17. Order Denying Motion for New Trial, page 34.
18. Notice of Appeal, page 39.
19. Petition for Appeal, page 40.
20. Order Allowing Appeal, page 83.

21. Citation on Appeal, page 93.
22. Stipulation for extending time for filing record in the U. S. District Court of Appeals, page 84.
23. Order extending time for filing record in the U. S. District Court of Appeals, page 85.
24. Stipulation for extending time to file and lodge Bill of Exceptions, page 35.
25. Order extending time to file and lodge Bill of Exceptions, page 36.
26. Stipulation for extending time to file and lodge Bill of Exceptions, page 37.
27. Order extending time to file and lodge Bill of Exceptions, page 38.
28. Stipulation waiving jury trial, page 17.
29. Order Settling proposed Bill of Exceptions, page 80.
30. All praecipes, pages 86-90 inclusive.
31. Bill of Exceptions as follows: commencing line 28, page 24, Bill of Exceptions, to and including all of page 25; all of said matter being contained in record pages 70 and 71.
32. Certificate of Clerk to transcript of record, page 91.

Signed at Seattle, Washington, this 1st day of June, 1931.

ANTHONY SAVAGE,
(U. S. District Attorney)

CAMERON SHERWOOD,
(Asst. U. S. District Attorney)
Attorneys for Appellant.

GRAHAM K. BETTS,
Attorney for Appellee. [96]

No. 6484

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JESSIE SMITH, ADMINISTRATRIX OF THE ESTATE OF JAMES W. WHITEHEAD, DECEASED, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
Special Counsel, Veterans' Administration.
BAYLESS L. GUFFY,
Attorney.
LESTER E. POPE,
Attorney, Veterans' Administration.

INDEX

CASES CITED

STATUTES CITED

OTHER CITATIONS

70842—31——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6484

UNITED STATES OF AMERICA, APPELLANT

v.

JESSIE SMITH, ADMINISTRATRIX OF THE ESTATE OF James W. Whitehead, Deceased, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Plaintiff, appellee herein, instituted this action to recover on a contract of War Risk Term Insurance granted one James W. Whitehead by defendant while in its military service.

Plaintiff's amended complaint (R. 1–5) contains two counts.

In her first count, after alleging the enlistment and discharge of the insured and the granting of the contract sued on, plaintiff alleges in Paragraph IV (R. 2) that on the 20th day of November, 1918,

the insured became permanently and totally disabled, by reason whereof there became due and owing to him the sum of $57.50 per month.

In Paragraph V of her complaint (R. 3) plaintiff alleges that the insured died on the 30th day of September, 1921, and that by reason thereof his estate became entitled to receive from the defendant the sum of $57.50 per month from that date.

In her second count (R. 3) plaintiff, after realleging the matters pleaded in Paragraphs I, II, and III of her first cause of action, alleges that the defendant made a compensation rating in favor of the deceased from a date prior to the lapse of his contract sufficient to pay premiums on his contract to and including July 27, 1921, the date of his recognized total and permanent disability. This count contains further allegations intended to state a cause of action under the provisions of Section 305 of the World War Veterans' Act, 1924, as amended. However, since the court did not find for plaintiff on this count, it is unnecessary to go into the details thereof.

In its answer to the first count of plaintiff's complaint (R. 5–7), defendant, after admitting the enlistment and discharge of insured and the granting of the contract sued on, denies that insured became permanently and totally disabled as alleged and denies that the plaintiff is entitled to receive from it the sum alleged.

In answer to the second count of plaintiff's complaint (R. 7–8) defendant denies each and every allegation thereof.

Defendant filed its petition to join Lilly Gladys Whitehead as a defendant in this action (R. 9–11), and an order granting the petition was made (R. 12).

This cause was tried to the court, sitting without a jury (R. 47), a jury having been waived in writing (R. 17).

At the close of plaintiff's evidence (R. 64, 65) defendant moved for a nonsuit as to both counts of plaintiff's complaint, which motion was overruled (R. 65).

At the close of the whole case (R. 71) the defendant moved for judgment, which motion was denied (R. 71).

The codefendant, Lilly Gladys Whitehead, was defaulted and a judgment rendered against her. (R. 18.)

Whereupon the cause was submitted to the court, which found its findings of fact and conclusions of law. (R. 82, 83.)

Whereupon judgment was rendered in favor of plaintiff on the findings of fact and conclusions of law of the court. (R. 30.)

Defendant filed its motion for a new trial (R. 33), which motion was by the court overruled (R. 34).

From the judgment in favor of plaintiff defendant is here with this appeal.

ASSIGNMENTS OF ERROR

I

That the Court erred in overruling defendant's objection to the introduction of Bureau ratings, they being defendant's Exhibit —, on the ground that they were immaterial.

II

That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. —, on the ground that they were not properly identified, and on the further ground that the government had no opportunity to cross-examine the physicians who made the reports.

III

That the Court erred in refusing to admit in evidence the personnel records of the Great Northern Railway and the report of physical examination made for the railroad by Dr. Flynn, they being defendant's Exhibit No. — for identification.

IV

That the Court erred in awarding judgment to the Administratrix of plaintiff's estate of insurance installments accruing subsequent to the veteran's death when there was no evidence offered to show that there was no designated beneficiary of said insurance.

V

That the Court erred in failing and refusing to dismiss the second cause of action of plaintiff's complaint for want of jurisdiction, and on the further ground that the decision of the United States Veterans' Bureau on such a compensation matter is conclusive, final, and not subject to jurisdictional review.

VI

That the Court erred in denying defendant's motion for a nonsuit made at the the close of plaintiff's case and renewed at the close of all of the testimony, for the reason that plaintiff did not prove permanent and total disability of James W. Whitehead during the time his policy was in effect, to which denial of said motions defendant took exceptions, and exceptions allowed.

VII

That the Court erred in entering judgment in favor of plaintiff, as the evidence was insufficient to sustain such judgment.

VIII

That the Court erred in denying defendant's motion for a new trial, to which denial exception was noted by defendant.

IX

That the Court erred in refusing to make and enter Finding of Fact No. III, proposed by defendant, which is as follows:

> That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of $10,000, designating no authorized person as beneficiary on said policy; that thereafter there was deducted from his monthly pay as premium for said insurance the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof the defendant agreed to pay said James W. Whitehead the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

To which failure defendant noted an exception.

X

That the Court erred in failing and refusing to make and enter Finding of Fact No. IV proposed by defendant, which is as follows:

> That James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

To which refusal defendant noted exception.

XI

That the Court erred in its failure and refusal to make and enter Finding of Fact No. V proposed by defendant, which is as follows:

> That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

To which failure defendant duly excepted.

XII

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VI proposed by defendant, which is as follows:

> That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

To which failure defendant noted exception.

XIII

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VII proposed by defendant, which is as follows:

> That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for nonpayment of premiums November 31, 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on

July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

To which failure defendant noted exception.

XIV

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VIII, proposed by defendant, which is as follows:

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to wit, wages ranging from $5.11 a day to $6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

To which failure defendant noted exception.

XV

That the Court erred in its failure and refusal to make and enter Finding of Fact No. IX proposed by defendant, which is as follows:

> That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

To which failure defendant noted exception.

XVI

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. I proposed by defendant, which is as follows:

> That the plaintiff is entitled to recover on either cause of action herein.

To which refusal defendant duly noted its exception.

XVII

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. II proposed by defendant, which is as follows:

> That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

To which refusal defendant duly noted its exception.

XVIII

That the Court erred in making and entering plaintiff's Finding of Fact No. IV, which is as follows:

> That during the period of service of the Deceased in the United States Army he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, by reason whereof he became entitled to receive from the Defendant the sum of $57.50 per month, commencing on the said 20th day of November, 1918.

To which Finding defendant duly entered its exception.

XIX

That the Court erred in making and entering plaintiff's Conclusion of Law No. II, which is as follows:

> That the plaintiff is entitled to recover from the Defendant, United States of America, the sum of $57.50 per month, commencing on the 20th day of November, 1918.

To the entry of which defendant duly entered its exception.

XX

That the Court erred in denying defendant's motion to strike the testimony of witness Renche, on the ground that it was too indefinite, to which denial the defendant duly entered its exception.

XXI

That the Trial Court erred in entering judgment in favor of the plaintiff in violation of the provisions of Section 300 of the World War Veterans' Act and United States Code Annotated, Title 38, Section 511, in that Lilly Gladys Whitehead was the only beneficiary designated in the policy of insurance herein sued upon.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All

officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act, regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, and forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the

provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided, however,* That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further,* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under

the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge or receive any fee or compensation except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female)

and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau

of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

"1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for in both cases except as otherwise provided.

"2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates: * * *

"Rates at ages higher or lower will be given on request.

"The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected be-

fore the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at the net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

"3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

"(T. D. 20 W. R.)

"TOTAL DISABILITY

"Regulation No. 11 relative to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent."

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.
W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT 1

The court erred in overruling defendant's objection to the introduction of the Bureau's ratings.

In the case of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, l. c. 806, the court said:

> The report discloses that it was made to the compensation division of the Veterans' Bureau; that is, it was made for the pur-

pose of compensation. Disability under a war-risk insurance policy is a different thing than disability under the compensation statutes. Disability under a war-risk insurance policy is such "impairment of the mind or body as renders it impossible for the assured to follow continuously any substantially gainful occupation." War-risk insurance deals with the individual case and with "any" occupation. Disability under the compensation statute, on the other hand, deals with "average impairments," and with inability to follow a pre-war occupation. Title 38 USCA, Sec. 477, defines disability ratings for the purposes of compensation as follows: "The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury."

That part of the report which estimates the disability of Runkle for compensation purposes is, therefore, immaterial, for it is not an estimate of his ability to pursue any gainful occupation, but is an estimate of the "average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment."

> Plaintiff also offered a rating made by the Central Office Board of Appeals, on April 12, 1923, after the death of the insured. This was properly excluded; it was not identified, and it states no facts pertinent to the inquiry. In *United States* v. *Golden*, 34 F. (2d) 367, 370, this court said: "This is enough to indicate the immateriality of 'ratings'" for compensation in an insurance case. The doctors making the "ratings" are of course competent witnesses, just as doctors examining for other purposes are; but it is their testimony that is competent, and not the Bureau's "rating" predicated thereon.

We think that the rule announced in the case, supra, is correct and if so, it was prejudicial error to admit the rating in the instant case.

Point II

The court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of insured.

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay, in that they report simply what the doctor making them says

he found upon examination of the deceased and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the deceased, which are clearly self-serving. In this connection it should be kept in mind that at the time the examinations were purported to have been made the deceased had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made, for the defendant were for the purpose of determining whether deceased had any disability. Therefore it was to the interest of the deceased that he have a disability, and certainly any statements he made at such a time fall within the class of self-serving statements, the same as any statement a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this Brief understand, always excluded from evidence. Again, by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the Cole case, l. c. 341, the court said:

> There was no error in the admission of appellee's Exhibits H and I. These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the Cole case only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the Runkle case, l. c. 806, the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.
>
> The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States Government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *
>
> This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of

> the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war-risk insurance case, such reports and records. In *Evanston* v. *Gunn,* 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the Runkle case required that reports of the character of plaintiff's Exhibits should be properly identified. Furthermore, in view of the use of the language, "Particularly is this true of findings of a physical examination" and the language "It is our conclusion that as far as material to the issues the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the Wilson case (Not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error; FIRST, that the court erred in admitting certain reports of physical examinations made of the plaintiff, which were contained in the files of the United States Veterans' Bureau; SECOND, that the court erred in not directing a verdict for the defendant.
>
> The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat,* decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case* there was no question of the admission of anything other than the certificate of the physicians, and the field hospital tags were entries made by the field hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving decla-

rations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, relied upon by attorneys for the plaintiff, are easily distinguished from the instant case, and assuming without deciding that the reports in those cases were properly admitted these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

Point III

The court erred in awarding judgment for installments accruing subsequent to insured's death.

The court will take judicial notice that the contract herein sued on is a creature of statute and of the statutes controlling same.

Section 303 of the World War Veterans' Act, 43 Stat. 1310, provides, in part:

> If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of

> last payment made under any existing award. * * *

Under the terms of the statute just quoted, plaintiff was not entitled to recover all the installments provided for under the contract sued on as found in the judgment appealed from, unless no person within the permitted class was designated as beneficiary under the contract, or if a beneficiary was designated he did not survive the insured, or survived the insured and died prior to receiving all of the installments. Plaintiff adduced no proof that no person within the permitted class was designated as beneficiary of the contract sued on, or that such person was designated and did not survive the insured, or survived him, but died prior to receiving all the installments due under the contract. Therefore, the court erred in rendering judgment for plaintiff for all the installments accruing subsequent to the death of insured.

Point IV

The court erred in denying defendant's motion for nonsuit.

Treasury Decision Number 20, page 17 of this brief, which is a regulation promulgated under sanction of law, and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation

* * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover she must produce some substantial proof that the insured, James W. Whitehead, within the time alleged in her complaint, namely, November 20, 1918, or within thirty-one days after December 1, 1918, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation, and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

Carl A. Whitehead for plaintiff testified (R. 51–53) that the insured worked for the Great Northern Railroad from the Fall of 1918 until the Fall of 1920.

H. W. Donahue for plaintiff testified (R. 54–56) that insured worked for the Great Northern Railroad in 1918, 1919, and 1920. This witness further testified that insured was a member of his crew and sometimes acted as foreman of the crew and while so acting performed the same duties as witness did when foreman. This witness also testified that credits were given insured on July 1, 1920, and January 1, 1921. That witness did not receive any credits.

W. H. Horton for plaintiff testified (R. 56–58) that after insured was discharged he came back to

the Great Northern Railroad and worked as a switchman.

Dennis O'Hearn for defendant testified (R. 65–67) that he was Chief Clerk in the Superintendent's office of the Great Northern and that defendant's exhibit A is the original pay roll for insured. This witness further testified that insured was paid in—

> November, 1918, 48 hours, 64¢ an hour, $30.70. In December, 1918, 240 hours, for which he was paid $153.80. In January, 1919, he was paid $148.50, working 232 hours. In February, 1919, he was paid $102.40, working 160 hours.
>
> A 31-day month has 248 hours—eight hours a day. February was a 28-day month.
>
> During March, 1919, he earned $128.15, working 215 hours. During April, 1919, he was paid $138.60, working 246 hours. During May, 1919, he was paid $133.15, working 208 hours. In June, 1919, he was paid $112.60, working 176 hours. During July, 1919, he was paid $143.35, working 208 hours. He was paid the same rate as other men in the same capacity. During the month of August, 1919, he was paid $97.30, working 152 hours. During September, 1919, he was paid $133.90, working 26 days, or 208 hours, and 30 minutes overtime. During October, 1919, he was paid $161.15, working 30 days, and one-half hour overtime. That was a full month. During November, he was paid $157.55, working 30 days, and one hour overtime. He was employed during November

for thirteen days as night foreman. During December, 1919, he was paid $150.65, working 28 days and several items of overtime, aggregating 225 minutes overtime. During January, 1920, he was paid $145.20, working 28 days. During the month of February, 1920, he was paid $117.50, working 23 days. During the first half of March, 1920, he worked ten days as a switchman, four days as a foreman, and earned $72.75. The rest of the month of March is not in the records for some reason or other. He was paid $84.10 for the rest of March, or 16 days, and 2½ hours overtime. During the last half of March he worked one night as foreman. During April, 1920, he earned $151.15, working 29 days. He was employed 9 days of that time as foreman. During May, 1920, he was paid $119.10, working 23 days and 110 minutes overtime. During June, 1920, he was paid $133.85, a total of 26 days, and one hour overtime. The second half of July does not seem to be in here—only the first half of July. He worked 10 days and earned $51.35 during the first half of July. I can not tell whether he was on vacation the last half of July. In August, 1920, he was paid $188.55, working 29 days, with 30 minutes overtime. His salary was increased during August, 1920, the increase applying to everybody. He was paid $149 in September, 1920, working 23 days. During October, 1920, he was paid $156.85, working 24 days, and 65 minutes overtime. During the month of

> November, 1920, he was paid $114.10, working 16 days and 20 minutes. I have no record showing that he worked after November, 1920.

While, as stated, the witnesses, Whitehead, Donahue, and Horton, testified that insured worked for the Great Northern Railroad, they also testified in detail that he did not work regularly and that they noticed he was not as efficient as before the War and related different things that they had observed insured doing and about him. However, the fact remains that from their testimony it is gathered that insured worked with reasonable continuity from the Fall, 1918, until the Fall, 1920.

We gather from an unchallenged objection, made by defendant's counsel, to the hypothetical question propounded Doctor Tracy, a witness for plaintiff (R. 62), that the insured was treated for gonorrhea and syphilis while in the military service. Furthermore, it appears from the testimony of this witness that the insured was suffering from paresis caused by syphilis. Hence, it seems that we have in this case a suit on a war risk insurance contract where it will hardly be contended that the disability claimed was due to the insured's war service. Therefore, there is no call for the application of the rule intimated in some decisions in suits of this character that such contracts should be liberally construed in favor of the insured.

Referring to the insured, the learned trial court in its decision (R. 72, 73) said, in part:

> That he was employed by the Great Northern Railway Company as switchman from November, 1918, until November, 1920, for a very large portion of the time, covering a period of twenty-five months. During that time he worked some three or four months—possibly four, or five whole months, and the other months he worked a greater part of the month; he received the same wages that were paid to other employees in like work.

Yet, notwithstanding this finding, the trial court found that insured was permanently and totally disabled during that period.

In view of the holding of the learned trial court, that the insured was permanently and totally disabled at the time he was discharged from the military service, and, as stated by the trial court in its decision (R. 75) there was no necessity for passing upon the second cause of action. However, we find the trial court saying:

> If this condition (referring to the paresis or syphilis) parentheses ours—was in his system at his enlistment, and if the Government position is true—but the presumption is that he was free from anything of this sort, and there is no evidence that he was, except some statement that says that there was some scab on the end of his penis, but being accepted, the Government is bound. He is presumed to be—to have been all right. There is no evidence that he did anything to bring about

> any condition of syphilis; and if it was in his system there was something to aggravate it—whether it was aggravated, the Court was unable to say, nor is it necessary; and as to his misconduct in service and in the absence of proof, the presumption would be that his conduct was good—the presumption would be in his favor.

In rendering the last above quoted part of its decision, the learned trial court evidently had in mind the provisions of Section 200 of the World War Veterans' Act, as amended July 2, 1926, 44 Stat. 793, with reference to the presumption of sound condition of persons entering the military service of the United States. However, the learned trial court overlooked the fact that Section 200, supra, was amended by an Act approved July 3, 1930, 46 Stat. 995, expressly providing that the presumption of sound condition and the presumption of the service connection of certain disabilities therein named had no application in suits on war-risk insurance contracts.

In the case of *Owen D. Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court quoted with approval from *Woolworth Company* v. *Davis* (C. C. A. 10), 41 Fed. (2d) 342, 347, as follows:

> "When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it." *American Car & Foundry Co.* v. *Kindermann* (C. C. A. 8), 216 F.

499, 502; *Missouri, K. & T. Ry. Co.* v. *Collier* (C. C. A. 8), 157 F. 347, cert. denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments can not and should not stand if they are entered upon testimony that can not be true.

The evidence in the case at bar discloses the physical fact that insured worked with reasonable continuity for substantially gainful wages for a period of, as stated by the trial court in its decision, twenty-five months. Therefore, under the ruling in the Nicolay case, supra, the testimony of the witnesses, that insured was not able to do this work, should not be held to be "substantial evidence" sufficient to support the finding for plaintiff.

Point V

The court erred in its refusal to make Finding of Fact No. VII, proposed by the defendant.

It is not disputed that the contract sued on lapsed for nonpayment of premiums on November 31, 1918, unless the insured became permanently and totally disabled on or before that date. For the reasons assigned in support of Point IV of the argument herein insured did not become permanently and totally disabled on or before that date. Therefore the court erred in not finding as re-

quested by defendant in its requested Finding No. VII.

Point VI

The court erred in its refusal to make Finding of Fact No. VIII, proposed by defendant.

For the reasons assigned in support of Point IV of the argument herein the court erred in not finding as requested by defendant in its requested Finding of Fact No. VIII.

Point VII

The court erred in entering judgment in favor of plaintiff and in denying defendant's motion for a new trial.

Since, as shown in the argument in support of Point IV of this Brief, the court should have sustained defendant's request for a nonsuit and motion for judgment in its behalf, it was error for the court to render judgment for plaintiff and deny defendant's motion for a new trial.

Point VIII

The court erred in making and entering plaintiff's Conclusion of Law No. II.

Since, as shown in the argument in support of Point III, plaintiff was not entitled to recover all the installments accruing subsequent to the death of the insured, unless the proof showed that no beneficiary was designated under the contract, or if designated had predeceased insured, or survived him and died before receiving all the installments

and further, since, as shown in the argument in support of Point IV, the proof herein failed to show that insured became permanently and totally disabled during the life of the contract sued on, thereby maturing same, the plaintiff was not entitled to recover herein, and it was error in the court to conclude that as a matter of law she was entitled to recover.

Point IX

The court erred in its refusal to make Conclusion of Law No. II, as proposed by the defendant, that both of plaintiff's causes of action be dismissed and the defendant have judgment.

For the reasons assigned in support of Point IV of the argument herein, the defendant was entitled to judgment and therefore the court erred in not dismissing plaintiff's causes of action and rendering judgment for defendant.

For the foregoing reasons it is respectfully submitted that the judgment be reversed.

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In the
United States Circuit Court of Appeals
For the Ninth Circuit

No. 6484

UNITED STATES OF AMERICA,
Appellant,

v.

JESSIE SMITH, Administratrix of the Estate of James W. Whitehead, Deceased
Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

Brief of Appellee, Jessie Smith, Etc.

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STATEMENT OF THE CASE

This case arises under a contract of war risk insurance issued by the defendant, appellant herein, to one James W. Whitehead, deceased, while serving in the military forces of the United States, during the last

war. These allegations of the complaint (R. 1-2) are admitted by the defendant's answer (R. 6). The amended complaint then sets forth the fact that the deceased was totally and permanently disabled within the terms of his policy of insurance (R. 2-3), which allegations are denied by the defendant in its answer (R. 7), the denial thereof creating the issues in this case. The amended complaint contains a second cause of action, alleging maturity of the insurance therein sued upon under Section 305 of the World War Veterans Act, 1924 as Amended. All such allegations of the second cause of action are denied. The Court finding for the plaintiff on the first cause of action, it is unnecessary to refer further to said second cause of action (R. 26). After the commencement of this action the defendant, pursuant to statute, filed a petition for joinder of party defendant, to-wit: one Lilly Gladys Whitehead, originally named beneficiary (R. 9). This order was subsequently granted (R. 12), and the said Lilly Gladys Whitehead was joined as party defendant in order that her rights, if any, might be determined, the insured being deceased. Upon failure to locate said Lilly Gladys Whitehead, summons was ordered against her by publication (R. 14-15), and on failure of said defendant to appear, default was taken against her (R. 18).

From the judgment entered in favor of the plaintiff (R. 30), the defendant United States of America hereinafter referred to as "the defendant," has taken this appeal, alleging several errors, which will be argued in the same order appearing in the appellant's brief.

ARGUMENT

I.

The first alleged error is that the Court erred in overruling defendant's objection to the introduction of the Bureau ratings. It is assumed that this assignment of error is directed to plaintiff's Exhibit No. 2, which is a rating sheet made by the Bureau on January 1st, 1922, giving a compensation rating to the insured, who was then deceased. It is called to the attention of this Court that the second cause of action in this case was brought under Section 305 of the World War Veterans Act, 1924 as Amended, providing:

> "Where any person has, prior to June 7, 1924, allowed his insurance to lapse, * * * while suffering from a compensable disability for which compensation is not collected, and dies or has died, or becomes or has become permanently and totally disabled, and at the time of such death, or permanent total disability, was or is entitled to compensation remaining uncollected, then and in

> that event so much of his insurance as said uncollected compensation, * * * would purchase if applied as premiums when due, shall not be considered as lapsed * * *."

Under this Section of the Act. the plaintiff in her amended complaint, second cause of action, alleged that at the time the insured's insurance lapsed, the defendant, by and through the United States Veterans Bureau, did owe to the insured compensation sufficient to pay all premiums on his insurance, and that said compensation remained uncollected at the time of total and permanent disability as recognized by the defendant on July 27th, 1921, and also at the time of the death of the insured on September 30th, 1921, by reason whereof the insurance had not lapsed (R. 3-4).

It would seem that Congress intended that Section 305, *supra*, should be of some benefit to a veteran and, in the face of the defendant's denial to the allegation under Section 305 (R. 8), the plaintiff would be unable to prove that compensation was due and uncollected were she not permitted to introduce the rating sheets made by the Bureau for this purpose, which rating sheets showed that the deceased did have a compensable disability at all times from the date of his discharge until his death. It must be borne in

mind that the only purpose of the introduction of this document was to prove the allegation that the deceased did have a compensable disability and that such disability was recognized by the Bureau, and it has been uniformly held that before a claimant can avail himself of the benefits of Section 305 the Bureau must first have made a rating and award. See *Maddox v. United States*, 16 Fed. (2d) 390; *Armstrong v. United States*, 16 Fed. (2d) 387; *Hollrich v. United States*, 40 Fed. (2d) 739; *Berntsen v. United States*, 41 Fed. (2d) 663.

It is admitted that a rating sheet would not be competent to show total and permanent disability, but it is submitted that it is competent and, in fact, is the only possible way to prove the right to benefits accruing under Section 305. However, in the instant case the admission of this rating sheet seems not to have been prejudicial, the Court before whom the case was tried, without a jury, having made and entered its findings of fact under the first cause of action, without any reference to the exhibit now complained of.

II.

The second error urged by the plaintiff is based upon assignment of error No. II (R. 40) as follows:

> "That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. __, on the ground that they were not properly identified, and on the further ground that the government had no opportunity to cross-examine the physicians who made the reports."

The assignment of error is based upon the ground of improper identification and upon the denial of the defendant's right of cross-examination of the doctors making the reports here objected to, the admission of which is claimed to be error.

In reference to the first ground for the alleged error, that is, that the document was not properly identified, the attention of this Court is respectfully called to the objection made by defendant's counsel at the time this document was offered in evidence (R. 50) that the document was not properly identified is not a part of the objection and hence is not available as an assignment of error at this time.

The purpose of an objection is to apprise the trial court, and opposing counsel as well, of possible error in the proceeding and to give the trial court an opportunity to correct such possible error and to give opposing counsel an opportunity to supply, if possible, the deficiency in the evidence to which objection is

made. Consequently, it has been held, and seems to be practically the universal rule that an appellant cannot raise an objection for the first time on appeal, nor can he present grounds of objection not first presented to the trial court. See *Louie Share Gan v. White*, 258 Fed. 798; also *Kalamazoo Rwy. Supply Co. v. Duff Mfg. Co.*, 113 Fed. 264.

The second ground of objection to the introduction of plaintiff's Exhibit 4 is that the defendant was denied its right of cross-examination. There are numerous decisions admitting of the right that records and particularly reports of physical examinations made by the Veterans Bureau should be admitted in evidence, in a war risk insurance case. See *McGovern v. United States*, 294 Fed. 108, affirmed 299 Fed. 302; *Runkle v. United States*, 42 Fed. (2d) 804; *United States v. Cole*, 45 Fed. (2d) 339; *United States v. Stamey, et al*, 48 Fed. (2d) 150; *Nichols v. United States*, 48 Fed. (2d) 293.

It is also urged in the defendant's brief, but not assigned as error, that this report is inadmissible as containing hearsay statements and self-serving declarations. If this ground of objection is available, it is submitted that it was too general to warrant reversal. If the report contains inadmissible matter as well as matter which is admissible in evidence,

an objection directed to the whole of the record is not sufficient to warrant the Court in excluding it *in toto*. And unless the Court's attention is specifically directed and the objection made to the particular part of the report alleged to be inadmissible, the Court need not consider the objection. See *United States v. Stamey, et al, supra.* However, this report was obtained by the agents of the defendant for the purpose of treating and, if possible, of curing the deceased, and such statements as are here contended to be hearsay and self-serving declarations would seem to fall within the rule permitting such evidence as history obtained by physicians for purposes of treatment, and therefore presumed to be true. It is further believed that there was no prejudice in admitting this report in view of the fact that it was made subsequently to the date on which the defendant admitted the deceased to have been totally and permanently disabled (R. 51). See *United States v. Cole, supra.*

III.

The third error argued by the defendant is that the Court erred in awarding judgment for instalments accruing subsequently to the insured's death. This alleged error appears to have been an afterthought on the part of the defendant. It was not made the basis of any objection at the trial, nor was

the matter apparently considered of any moment during the course of the trial. The judgment was O. K.'d by the attorney for the defendant as well as by the attorney for the United States Veterans Bureau (R. 32). No amendment was ever proposed, and it was not urged or suggested as ground for a new trial (R. 33) and at the time this appeal was taken no error was assigned on account thereof (R. 39-47). Subsequent to the time the appeal was allowed, an additional assignment of error was attempted to be filed and was printed as a part of the record (R. 87), assigning as error the judgment for instalments accruing after the death of the insured as violative of Section 300 of the World War Veterans Act, 1924, as amended, but the defendant's brief has departed even from this late assignment to claim error in this judgment by reason of Section 303 of the World War Veterans Act as amended. Rules of the Circuit Court for the Ninth Circuit provide:

> "The plaintiff in error, or appellant, shall file with the clerk of the court below with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. * * * When this is not done, counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded * * *." Rule No. 11.

It is felt that under this rule and under the cases interpreting this rule the error here complained of is not available to the defendant. See *Simpson v. Denver First Nat'l. Bank*, 129 Fed. 257; *Webber v. Mihills*, 124 Fed. 64; *Kreuzer v. United States*, 254 Fed. 34, certiorari denied, 39 S. Ct. 260, 249 U. S. 603, 63 L. Ed. 798.

For the purposes of this brief and not waiving our contention that this alleged error is not now available to the defendant, it is believed that it is without merit for the reason that the World War Veterans Act, Section 19, 1924, as amended, contemplates a situation where a possible interested claimant may not be available. Said Section provides in part:

> "All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct."

Under this provision the named beneficiary was duly and regularly served with summons and complaint by publication (R. 16) and upon her failure to appear default was entered against her (R. 18). It certainly was not within the contemplation of Congress

that heirs of a deceased insured should be foreclosed from receiving the benefits of the insurance where a possible named beneficiary has long since disappeared and is not to be found. This Court will certainly take notice of the fact that Section 19 aforesaid was intended to accomplish some purpose and must have been intended for a situation such as has here arisen. If Section 303 is contrary to Section 19 of the Act, this Court must construe the two together and give to them the interpretation reasonably to be gathered therefrom, and the only logical interpretation is that where a beneficiary has disappeared, her rights can be adjudicated under Section 19, providing how adverse claimants might be brought into court, and the failure of this beneficiary to appear and defend her claim, if any, in accordance with the summons lawfully served upon her, in accordance with directions contained in Section 19 of the Act, forecloses her from further claim in the premises; otherwise there could never be any determination of claims arising under this Act.

IV.

The next alleged assignment of error argued by the defendant in its brief is that the Court erred in denying the defendant's motion for a non-suit. This alleged error is not assigned as such in the defendant's

assignment of errors and consequently there seems to be nothing presented to the Court for review. Furthermore, this case was tried to the Court below without a jury (R. 17), and is subject only to such review as provided by statute, as follows:

> "When an issue of fact in any civil cause in a District Court is tried and determined by the Court without the intervention of a jury, according to Section 773 of this title, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." 28 U. S. C. A. 75.

Under the foregoing statute a motion for non-suit, denial of which is here alleged to be error (without any assignment thereof), is insufficient to bring anything before this Court for review, except the sufficiency of the facts found to support the judgment, concerning which there can be no question.

Without waiving the objection to presentation of this alleged error, for failure to assign the same, it seems quite apparent from a review of the evidence that the deceased was totally and permanently disabled, as found by the trial judge; and it seems unnecessary to go into great detail concerning this evi-

dence. It was shown that shortly after the deceased enlisted for service he was given the usual typhus innoculation and as a result of or following such innoculation the deceased was confined to the hospital where he received a spinal puncture, and he remained in the hospital until his discharge, at which time he was given a surgeon's certificate of disability and discharged on acount of what is therein stated to be nervousness (Plaintiff's Exhibit 1). After deceased was discharged he returned to work for the Great Northern Railway Company at the place where he had been employed for two years previous to his enlistment and where he resumed his old duties with a switching crew during which time "he acted like a man that was demented" (R. 54). The same witness, Mr. H. W. Donahue, testified that this peculiarity was noticed "five or six days after he came out of the service" (R. 54). He worked along, making innumerable mistakes, some rather serious, as shown by the testimony of all the witnesses (R. 51-58), but, as stated by the witness W. H. Horton, "Being a brother, we would overlook all these things instead of turning them in to the officials * * *. The rest of the men helped him with his work" (R. 57). And, as testified to by his mother, "They called him 'Goofey' " (R. 59). There is no better review of the evidence pos-

sible than that contained in the decision of the Court (R. 72-74), who had the opportunity of seeing and hearing all the witnesses, and who heard the witness Doctor Tracy testify when in his opinion the paresis, from which the deceased died, occurred, and who likewise heard the opinion of the Doctor who upon the evidence was of the opinion that the disease was in progress when the deceased was discharged from the service (R. 63). The testimony seems rather complete in showing the deceased to have been wholly unable and wholly unfit to perform any type of labor from the date of his discharge from the Army and particularly shows it to have been unsafe for the plaintiff to have been permitted to work, and that but for the sympathy and assistance given him by his fellow-employees he would not have been able to hold the position which he did have. Employment under such conditions has been held not to be a gainful employment. See *United States v. Eliasson*, 20 Fed. (2d) 821; *Jagodnigg v. United States*, 295 Fed. 916. This case, while presenting a different disability, is quite similar to the case of *United States v. Meserve*, 44 Fed. (2d) 549, wherein the Court said:

> "We feel that it would be giving to the work record a weight and force as a matter of law which in the light of attending circumstances it does not have, to say that there is no substantial

> proof in support of the verdict * * *. The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear; it is also entitled to the benefit of such reasonable inferences as arise out of the facts proved."

It has been held in innumerable cases, many of which have been decided by this Court, that the mere fact that a man worked is not conclusive against a finding of total and permanent disability. And the deceased, quoting from the opinion of the trial judge:

> "In this employment he worked, with very few exceptions, with and under foremen who were personally friendly to him, one who had been a very intimate friend for fifteen years or more, a room-mate for a large portion of the time, in the City of Seattle. * * * He was unreliable, he could not perform the duties that were entrusted to him. * * * they relieved him from the work and carried him along because he belonged to the union; never made any compalint to the officers of the company, because they did not want him to lose his position."

There certainly can be no merit in the contention that there was insufficient evidence to support the finding of the Court, and it would be a useless waste of the time of this Court to further detail the evidence or to cite further cases with which this Court is already familiar.

The remaining assignments of error urged in the brief of defendant all revolve around the question of the sufficiency of the evidence and do not require further argument.

It is respectfully submitted to this honorable Court that the appeal herein is without merit; that the several allegations of error are not substantiated by the proof, and that the finding and judgment of the trial court is in all things correct, and the defendant should take nothing by its appeal herein.

Respectfully submitted,

GRAHAM K. BETTS,
Attorney for Appellee.

WRIGHT & WRIGHT, *of Counsel.*

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6484

UNITED STATES OF AMERICA,

Appellant,

vs.

JESSIE SMITH, Administratrix of the Estate of JAMES W. WHITEHEAD, Deceased,

Appellee.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

HON. JEREMIAH NETERER, JUDGE

Appellee's Petition for Rehearing

GRAHAM K. BETTS
Attorney for Plaintiff
1402 Smith Tower, Seattle, Washington

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HON. JEREMIAH NETERER, JUDGE

Appellee's Petition for Rehearing

To the Hon. Curtis D. Wilbur, William H. Sawtelle and J. Stanley Webster, judges in the above entitled Court:

Jessie Smith, Administratrix of the Estate of James W. Whitehead, deceased, the appellee herein, by her attorneys respectfully petitions this Honorable Court

for a rehearing upon the two questions hereinafter set forth, and does hereby certify that this petition is made in good faith and that on the merits the same should be granted, and that it is not made for the purpose of delay.

I.

The rights of Lilly Gladys Whitehead were determined by this action.

The attention of the Court is directed to the opinion filed herein, on page 7 thereof, where the Court said:

"It should be stated that she (Lilly Gladys Whitehead) was not made a party by any amended pleading, and that no claim is asserted in the complaint adverse to her."

In this particular it is believed that the Court erred, because the complaint and the amended complaint in this action alleged in Paragraph III (R. 2): "That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of war risk insurance in the sum of $10,000.00, *designating no authorized person as beneficiary on said policy.*" While it is admitted that no proof was made in support of the italicized portion of the allegation, it will be observed upon a review of the complete record that apparently both parties thought such proof unnecessary in view of

the default against Lilly Gladys Whitehead, and it will be observed that neither the defendant's motion for non-suit at the conclusion of the plaintiff's evidense (R. 64), nor its motion for dismissal of the complaint, made at the conclusion of all the evidence, stated such failure as one of the grounds in support of such motion. Consequently, it is not believed that the objection was sufficiently taken to preserve this question on appeal. See *Noonan vs. Caledonia Min. Co.*, 121 U. S. 393. The fact, as stated by this Court in its opinion, that the insured might have subsequently to the time of application designated a beneficiary, does not affect the finality of the complaint against Lilly Gladys Whitehead, as any such change would be a matter which could be raised only by an affirmative defense, and no affirmative defense was interposed in this case, nor is it admitted or conceded, as stated in the opinion of this Court, that the insured named his wife or anyone within the permitted class as beneficiary. The only suggestion in the record that she was so named is contained in the defendant's petition for joinder of additional party defendant (R. 9), which petition it cannot be contended was a pleading; consequently the allegation that "James W. Whitehead applied for a policy of war risk insurance in the sum of $10,000.00, designating no authorized person as beneficiary on said policy"

stands before this Court unquestioned, and such allegation clearly would put any party claiming to be a beneficiary upon her proof.

It is further to be observed that the defendant Lilly Gladys Whitehead was joined as a party defendant not by the plaintiff, now your petitioner, but by the defendant, and the defendant by its petition for such joinder stated in Paragraph V thereof (R. 11), that the joinder was necessary to a complete and proper termination of this action. In view of this statement by the defendant, it would appear that the defendant had taken, and it has since maintained, the position of stakeholder, in the event any liability were established. Such liability having been established, the defendant Lilly Gladys Whitehead was in the position of an intervenor, made so by the defendant, and against whom no formal pleading was necessary. The fact that she was called a party defendant does not change her status from that of an involuntary intervenor to one against whom the plaintiff must offer evidence after default.

The Court apparently is of the opinion that the affidavit for default, stating as follows: "That upon motion of the defendant one Lilly Gladys Whitehead, who was designated as beneficiary in said policy, etc.," is an admission by the plaintiff that the said Lilly

Gladys Whitehead was so designated as a beneficiary. However, it is the plaintiff's position that such affidavit, made for the purpose of obtaining an order for publication of summons, is not a pleading, nor such a part of the record as to be, or to constitute, an admission by the plaintiff that the said Lilly Gladys Whitehead was so designated but, on the contrary, it is believed that the allegation in the complaint that no authorized person was designated is binding upon the Court and upon said Lilly Gladys Whitehead.

It is further submitted that should the Court adhere to its original decision in this case, the cause should be remanded for further proceedings against the said Lilly Gladys Whitehead because surely now the defendant, by judgment finding the deceased to have been totally and permanently disabled during the life of his policy of insurance herein sued upon, is stakeholder, or in the position of a disinterested third party holding money against which there may be adverse claims, for the settlement of which this Court should remand this case to the District Court, for determination of that single issue.

II.

The second question raised in this petition is solely for the purpose of clarifying the opinion of this Court in regard to the allowance of attorney's fees. The

decision filed, amended the judgment by "striking therefrom all payments accruing after the death of the veteran, awarding to the appellee only payments which had accrued at the time of the death of the insured. Attorney's fees will be reduced to one-tenth of this latter amount." In this respect, attention is called to the fact that by the action herein the full face value of the insurance policy was established and made payable by this action, and the full amount of such policy constitutes a part of the recovery, whether recovery for the plaintiff or for some other party yet to be determined, and in view of the War Risk Insurance Act, limiting as it does attorney's fees to one-tenth of the amount recovered, it is not believed that this Court intended to limit the attorney's fees only to amount payable to the estate. Rather it is submitted that such fees were necessarily reduced as a part of the judgment so that the stated amount thereof would not exceed one-tenth the amount of the judgment. It is further believed that the whole amount of the policy is payable by reason of the judgment in this case, and that no further judgment need by recovered against the defendant by any party in whose favor an award might be made, and in fact, that no further action could be maintained against the Government on this one policy, because were the said Lilly Gladys Whitehead to appear and claim the pro-

ceeds of the policy, said claim would not be denied by the Government, assuming she is not foreclosed by this action, and, consequently, no disagreement could be effected with the Bureau, by reason of which no Court could obtain jurisdiction to hear such cause.

For the foregoing reasons it is respectfully submitted that this Court should grant a rehearing upon the questions herein set forth.

Respectfully submitted,

WRIGHT and WRIGHT,
GRAHAM K. BETTS,
Attorneys for Appellee.

No. 6485

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

QUOCK HOY SING and QUOCK HOY MING,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration of the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This is an appeal from the judgment of the United States District Court for the Southern Division of the Northern District of California, Honorable A. F. St. Sure, presiding, denying a petition for writs of habeas corpus.

Quock Hoy Sing and Quock Hoy Ming are Chinese persons, aged sixteen and eighteen years, respectively, who are seeking admission to the United States as the natural foreign born sons of Quock Yuen, a native of the United States. By stipulation and order, the original immigration records were filed and deemed a part of the petition, and by stipulation and order the original immigration records were withdrawn from the lower Court and filed in the clerk's office of this Court.

QUESTIONS INVOLVED.

There are three propositions involved in this appeal:

First, the hearing before the Board of Special Inquiry was unfair because of the incompetency of the interpreters employed and the inability of the interpreters at the Angel Island Station to understand the Hock San dialect.

Second, the hearing was unfair for the reason that the immigration authorities refused to permit the father of the applicants to introduce a photograph into evidence which he claimed hung on the wall in the home in China.

Third, that the hearing was unfair in that the order of exclusion is not based upon evidence sufficient to warrant such an order being made.

ARGUMENT.

The Admitted Facts.

The citizenship of the father is admitted. It is also admitted that the father was in China at a time which makes it possible for him to be the father of two boys of the ages claimed by the applicants. After their birth, and on his return to this country and at every time he was called upon to do so by the Immigration authorities, the father gave the names, birthdates and ages of these applicants.

The Chairman of the Board of Special Inquiry in his findings stated: "Both of the applicants appear to be about the ages claimed by them."

I.

THE INTERPRETERS WERE UNFAMILIAR WITH THE HOCK SAN DIALECT.

The protracted hearing was spread over some seven days. The record consists of some fifty closely spaced typewritten sheets, covering a multitude of incidents and happenings. Every day a new member was substituted on the Board, and practically every interpreter at the station was used. The applicants claimed to have been born and raised in the Sun Wooey Hock San border district, but had been living in Canton, going to school there, for the past five years. The examination was in both the Cantonese and pure Hock San dialect. In quite a number of places the answers are not responsive, and self contradictions appear, and in many cases the witness denied stating things that were alleged to have been previously stated.

For instance it will be noted the applicant Quock Hoy Sing on several occasions was asked by the Inspector to use the dialect of his native village instead of the Cantonese dialect, which he had used by reason of his sojourn at the School at Canton, but the applicant continued to use the Cantonese dialect, notwithstanding the fact that the same instructions were frequently repeated. Finally on page 38 the Chairman asked the applicant why he refused to speak in the Sun Wooey Hock dialect, that is, the dialect of his native village. The testimony on this point is as follows:

> "You were admonished to testify in the Sun Wooey District dialect during the progress of this hearing and you said that you would do so. Why have you not done so?
>
> A. I was asked if I spoke the Sun Wooey dialect or not, but I was not asked to speak it."

Thereafter when the applicant understood that he was desired to speak the Sun Wooey Hock San dialect he did so, and on page 44 of the record the following statement appears from the Chairman to Interpreter Lee Park Lin:

> "Q. In what dialect has this applicant been testifying so far this morning?
>
> A. He has been testifying in the pure Sun Wooey dialect, that is the dialect of his native village. **I have difficulty in understanding this applicant because I am able to speak only the Sun Wooey City dialect.** I had to ask the applicant to speak very plainly in his dialect before I could understand him. I asked him if he can speak the Sun Wooey City dialect and he replied 'No.'
>
> Note by Chairman. Interpreter Mrs. D. K. Chang was present during a part of Interpreter Lee Park Lin's interpretation on this morning.
>
> She states the applicant now speaks the pure Sun Wooey dialect of his claimed native village."

And it is very interesting to note, that at the beginning of the same page of the testimony, same applicant being examined, this same interpreter, Mrs. D. K. Chang, stated that the applicant spoke Cantonese and not Sun Wooey dialect.

Now if the interpreters had difficulty in understanding the applicant, it is not surprising the applicants had difficulty in understanding the interpreters and similar statements made by these witnesses through the examination upon certain statements alleged to have been made by them previously and correcting alleged statements shows how often they did not understand the interpreters used in this case.

It is no wonder then that contradictions are to be found in this testimony, and it is not surprising there may have been some hesitancy in answering some of the questions when the witnesses did not understand what was wanted and the interpreter had difficulty in understanding the witnesses.

The Board of Review in Washington on the appeal well said:

> "The testimony shows considerable confusion and numerous changes and corrections which seem to be due to the fact that the applicants speak an unusual dialect **which some of the interpreters had difficulty in understanding.**"

And that puts the whole situation so well, in better words than we can express it, that we most heartily agree with them, as to the misinterpretation.

This Honorable Court in case of *White v. Wong Quen Luck,* 243 Fed. 547, in discussing the identical proposition said:

> "If, as a matter of fact there has been serious error made in the interpretation and recording of the answers given by an applicant to the questions propounded to him before the immigration authorities, and if the applicant or his counsel has not had opportunity of reading the record, and if it is made clear that such error in interpretation and recording is in direct respect to the matters upon which the immigration authorities have finally based their order of deportation, he may in petition for habeas corpus set up that he has been denied a fair hearing.
>
> **Under such circumstances the primary question would be, not whether there was an abuse of discretion on the part of the immigration authorities, not**

whether the weight of the testimony purporting to have been given is for or against admission, nor whether he understood the import of the questions propounded to him, but is whether the applicant has been examined fairly at all as to his right to admission in the United States. This must be so, for it is self-evident that an essential requisite of a fair hearing is that the interpreter employed must know two languages, English and Chinese, sufficiently well to translate the questions and answers with substantial accuracy. Guided evidently by the justice of such a view, the judge of the District Court permitted the petitioner, Luck, to testify that the interpretation of the dialect which he spoke had been inaccurately made and recorded before the immigration officials, in that, if the answers to the questions which were propounded had been correctly interpreted and recorded, they would have shown that he was the son of Wong Shoon Jung, and therefore entitled to admission.

We are of the opinion that the District Court committed no error in taking jurisdiction and hearing the testimony of the petitioner, and in the absence of the testimony from the record we find no reason for concluding that the court erred in holding that the applicant did not have a fair hearing." (Boldface supplied.)

In the very recent case, *Gonzales v. Zurbrick,* 45 Fed. (2d) 934, Court said:

"Upon the hearing of March 16th, 1929, Inspector Yeager recognized the alien's complaining by substituting another, and later a third, interpreter. As indicated, the Board of Review concluded that this action gave support to her claim and reopened the case, but, notwithstanding the evidence adduced upon the re-

> hearing affecting the competency of the interpreter the alien was ordered deported upon a consideration of the whole record. The function of an interpreter is an important one. It affects the constitutional right. The right to a hearing is a vain thing if the alien is not understood. It is of vital concern not only to the alien but to the Government as well, and it is not unreasonable to expect that, where the services of an interpreter are needed, his capability should be unquestioned."

We most respectfully urge that this Court must reverse this case on this point alone. An examination of the records shows that some interperters were only used for a question or two, evidently because they could not understand the dialect. Most of the interpreters that were used spoke the Sun Ning, Poy Ping or Cantonese, as very few people in the United States speak the Hock San dialect. Under the circumstances, as the Board of Review stated in the quotation hereinbefore set out:

> "These applicants speak an unusual dialect which some of the interpreters had difficulty in understanding."

II.

THERE IS AN AFFIDAVIT OF THE FATHER IN THE RECORD WHICH STATES IN SUBSTANCE THAT AFTER THE HEARING AND HE WAS UNDER THE RULES ABLE TO SEE THE TESTIMONY, THAT HE HAD CALLED TO THE ATTENTION OF THE BOARD OF INQUIRY THE FACT THAT THERE WAS A PHOTOGRAPH OF THE PATERNAL GRANDMOTHER WHICH HE WISHED TO BE PRESENTED TO THE APPLICANTS FOR IDENTIFICATION AND THAT THIS PRIVILEGE WAS DENIED HIM, AND THAT HE HAD REQUESTED AN INTERPRETER FAMILIAR WITH HIS DIALECT.

The affidavit of Quock Yuen reads as follows:

"Quock Yuen being first duly sworn deposes and says that he is the blood father of Quock Hoy Ming and Quock Hoy Sing. That at the hearing of said cause, this affiant told the examining inspector that he desired to introduce into the record the photograph of the affiant's mother for the purpose of having his sons identify it inasmuch as there was a similar photograph in their home in China. The offer having been made to the inspector, the inspector refused to accept it, saying no, that the affiant would not need them. Affiant further states that the photograph was not exhibited to the applicants during the hearing and that he, affiant, desires the same to be exhibited to them.

Affiant further states that the hearing of the application for admission of his said sons extended over a period of seven days, that during that time a great number of interpreters were used and that none of the various interpreters with the exception of one, were able to speak his native dialect or understand him thoroughly.

That your affiant frequently requested an interpreter who could speak and understand his native dialect, but the privilege was denied."

It requires no citation of authority to prove that the refusal of the immigration authorities to receive this evidence would constitute this hearing unfair, and a denial of due process of law.

III.

THE EVIDENCE.

We do not propose in this brief to take up the time of the Court and discuss each claimed discrepancy and the explanation thereof and that owing to the fact of faulty interpretation that the answers given to the various questions must of necessity be incorrectly translated. The most important so-called discrepancy, and the only one to do with the family relationship consists of the following:

It is claimed by the Board of Special Inquiry that the father stated his wife never had any brothers or sisters, and that his wife's mother, Lee Shee, was still living in Sew Kew village in China about 2 li east of his village, and there was no one living in her house with her; whereas applicant Quock Hoy Ming states his mother has a brother whose name is Leung Yin, and says that this brother with his wife and children live in the same house with his maternal grandmother in the Sew Kew village, and the other applicant at first according to the record testified that his mother did not have a brother, but later, on page 39 when asked whether he knew a man by the name of Leung Yin stated this person was his mother's brother, and that he with his wife and family, lived in his maternal grandmother's house in the Sew Kew village.

If this was a fraudulent case, or a coached case, there would never have been a living grandmother in a neighboring village.

This matter was not fully developed in the testimony of the father on further examination. This man is probably a cousin of the wife and not a blood brother, but the applicants have been in the custom of calling him uncle as is customary among Chinese children to call a cousin, and this is borne out by the first statement of the applicant Quock Hoy Sing that his mother had no brothers, but undoubtedly because he and the other brother had been in the habit of calling this man uncle, the relationship in their answer is shown as uncle instead of cousin. Moreover, a further and very probable explanation of this matter is the difficulty of understanding the interpreters. This is shown by the fact that at first one of these applicants actually stated that his mother had no brother. As to the fact the father says no one is living with his wife's mother in her house in Sew Kew village, whereas the applicants place this cousin or uncle as they call him in that house. The evidence shows that the father only made a casual visit to that village and does not even show when he made that visit so that he may not have seen this man or his family may not have been living there when the father made that visit. On this point he testified as follows:

"Q. Have you ever seen your wife's mother?

A. Yes, occasionally I saw her in her home in Sew Kew village."

It is further noted in the evidence that the father and these applicants all agree that they did not go together to

see this maternal grandmother, and that she never visited their home, so that the applicants who claim to have made very frequent visits would have more accurate knowledge as to whether this man was living in that house. And he and his family may have been living there when they made their visits and may not have been living there when the father visited her house. It may have been a long time since the father visited that house.

These differences may also undoubtedly be due to a misunderstanding between witness and interpreters as to just what is meant by living in a house. For instance, in this very record, the father on page 7, testified as follows:

> "Q. Can you state why you stated on April 25, 1911, that your family was **living** in Canton City?
> A. We went there only on a visit."

In other words he evidently considered his family being in the house on a visit as living in that house, or the word "living" in the question was not understood.

The description, moreover, of this maternal grandmother by all three witnesses is in remarkable agreement, the father and witness Quock Hoy Ming agree she was an old lady about 70 years of age, had difficulty in walking, that she uses a cane and sometimes wears glasses.

Applicant Quock Hoy Sing agrees fully with this description of his grandmother. He did not first state that she had a cane, but afterwards stated that she had a cane which she used on long walks; now, these little details are small things, but if this were not a genuine case this description of this old lady would not be so accurate as to every detail.

Another very important point showing that this is a genuine case is that when the boys were asked how this old lady was supported said, she had some money, and that their family helped her some, and contributed some to her, and it will be noted from the father's testimony that he agrees to this. These are the things which have a strong tendency to show the bona fide character of a case, and in view of the agreement, and under the circumstances cited, the alleged difference between them as to whether Leung Yin actually lived at that house is certainly not very important.

Especially is this true in view of this Court's decision in the case of *Jin Suey,* 41 Fed. (2d) 522, where the father and previous landed brother said a cousin lived in the second house of their row, and the applicant stated he was no relative.

We respectfully ask this Court to examine the record and briefs in the *Jin Suey* case which it has at its disposal. Particularly we call to the attention of this Court pp. 41, 42, 43 of the transcript of testimony in the *Jin Suey* case and pages 14 and 15 of the Government's brief, which relates to the discrepancy as to the cousin which the father and previous landed brother testified to, and of whom the applicant had never heard. As said by this Court in the *Jin Suey* case:

> "The discrepancies sink into insignificance when compared with the many subjects upon which there is agreement, and some discrepancies are to be expected in the testimony of the most truthful witnesses. Go Lun v. Nagle, 22 Fed. (2) 246; Nagle v. Dong Ming, 25 Fed. (2) 438. * * *

> When all the testimony is considered we think the discrepancy relative to the question of a little bridge in the village, as well as that in respect of the whereabouts of one Jin Tung On and **the relation to the family of one Jin Wee Gin,** is ruled by considerations adverted to by us in Nagle v. Wong Ngook Hong, 27 Fed. (2) 650.''

The all important question was, did the grandmother live in Sew Kew village? The collateral question as to who, if anybody was living with her, and as to whether he was an uncle or cousin pales into insignificance, when considered with the mass of detail and corroboration as to her existence and relationship, to-wit: as to her appearance, age, glasses, inability to walk without a cane, as to how she was supported partly from her own means and partly from contribution from the father. This detail alone is indicative of the truth of the statements of these parties and should be guiding to this Court.

IV.

THE ORDER OF EXCLUSION IS NOT BASED UPON EVIDENCE SUFFICIENT TO WARRANT SUCH AN ORDER BEING MADE.

Applicants Made a Very Strong Case in the Administrative Proceedings.

Now when we come to the favorable side of this case, there is no end to the remarkable agreements on details upon which these boys and the father could not possibly agree, if this was not a genuine case. The Court will note throughout that the movements of these applicants and the father from school to school, and place to place, and other events, is absolutely and perfectly in agree-

ment; the description of the whole house in every detail, of the home village, the family history, of the two schools where the boys went to school, are all in perfect agreement. They even agree upon such a minor thing as over the door of the home school the name of that school was carved in stone, and the proper name is given in the testimony. They all know the names at the home villages was ever known by, although when first being questioned about the name of the village they did not give all the names.

On page 7 of the testimony the father was asked: "Q. Have you ever heard of Lin Hong Village?" To which he answers: "This is the same character as Tong." And on this same point Quock Hoy Ming stated on page 46 as follows:

> "Q. You previously stated that the only name of your village was Lin Tong Village?
>
> A. I called my village Lin Tong for short, but the full name is Lin Tong Quong."

And on the same page, when he was asked:

> "Q. Have you ever heard of the Lin Tong Hong village?
>
> A. Yes, that is my home village."

This same name is agreed to by the other witnesses as being the name of the home village.

Many other telling points showing the bona fide character of this case fill the record, for instance, both applicants and father agree when the boys were at the home village he took them on numerous occasions to a nearby market and that on one of these occasions four or five years ago he took them to a certain barber shop, and the location of this barber shop was given as being near a tea

house, which they all agree is called "Kai Taw." These are incidents which speak very loudly for the relationship and of the truth of these two witnesses, and thousands of these similar instances could be pointed out in favor of the case, and the only discrepancies that really occurred in it are such as we would expect in a genuine case, because when these variances do occur, the events and connecting circumstances are in absolute agreement, and thereby make the variances of no importance.

And this is most remarkable in this case, because there is so much in the case which would give such a great chance for disagreement, if it were not a genuine case; for instance, instead of attending one school, these applicants are shown to have attended two schools, necessitating the description of these two schools and location of these two schools, and the teachers in these schools and everyone connected with school life in these schools, and the various trips they made home from one school to the other, the various trips they made and where they stayed during these times; such things as having their photographs taken, all is agreed to, who was with them and when the photographs were taken, and the trips they made to Hong Kong, having made two attempts to come to the United States, (the first time not being successful, owing to an embargo or quarantine on emigrants) and being detained in getting off, and on both of these trips they agree as to where they stayed in Hong Kong, what beds they slept in, where the beds were located, and everything connected with these trips, the modes of travel, etc., also the father's visits to the school in Canton City. They agree that he stopped at the Hong Fat Company where they stayed in Canton before they started to school, the location of the

school building, the description of the school; all of this mass of detail is in agreement. All of the events of any importance whatever are in agreement, and we respectfully urge to the Court that we cannot see how this case, under any circumstances, can be denied in view of the facts herein stated.

In addition to all of these favorable features, there is another very important item of evidence, and that is the group photograph which the father has presented in this case, of his wife and his sons. This photograph was taken ten or twelve years ago, and this photograph of his family would not be in his possession, or carried around with him, and would not be presented in this case, if this was not a genuine case. This photograph, although taken of these applicants ten years ago, when they were small boys, is an exact likeness of them, and is undoubtedly their photograph and these applicants are able to identify this photograph and every person in it, the same as the father does, and more than that, they agree that a similar photograph is at home in their house in China.

It is conceded that these boys are of about the age claimed by them. As to physical resemblance between the applicants and their father; a comparison of the photographs of the applicants and the group photograph by this Court will convince the Court as it does the writer, that the resemblance is most remarkable. As to the physical comparison between the father and the applicants, the Board of Review at Washington, stated:

> "In commenting upon the result of the physical examination, two of the three members of the Board at the port seemed to have noticed some resemblance between the alleged father and one or the other of the

> applicants. The Board of Review does not find on examination of the photograph submitted a resemblance in any convincing degree supporting the claimed relationship. There is also submitted a photograph claimed to be that of the alleged mother with three claimed sons of the alleged father including these two applicants taken when they were little children, but in the case of the older Hoy Sing it is by no means certain that he is identical with the child pictured in the group photograph, and there is no evidence to support the alleged father's interested claim that this group pictured is his family."

Thus it will be noted that there is a resemblance physically between the father and the applicants, and the Board of Review concedes definitely as to one of the applicants, that he is in the group photograph and that as to the other "it is by no means certain." How could the father bring any other testimony to show that the group family was his family, other than by the corroboration of all the witnesses that a copy of this photograph was in the home.

As said by this Court in the *Jin Suey* case heretofore referred to:

> "Indeed, upon so many matters of detail touching the home village and family life and history are the appellant, his alleged father, and an alleged prior landed brother, in accord, that escape from the conviction that appellee was reared in the village and sustained the most intimate relations to Jin Jung For's family, is well nigh impossible. **No coaching unless carried on through a series of years would enable the witnesses to testify in such good agreement upon so many points.**"

We do not wish to burden the Court with excerpts from the decided cases which support our contention that the discrepancies, if any, are immaterial when considered with the great mass of detail on which the witnesses are in agreement.

In *Johnson v. Ng Ling Fong,* C. C. A. 1st, 17 Fed. (2d) 11, the Court said:

> "The records in the Immigration Department concerning the alleged father and his family since 1909 are so complete, and the statement as to the number of births of his children have been so consistent, through this long period of time, that it is inconceivable that fair-minded men, free from bias and suspicion, should entertain any reasonable doubt as to the relationship of the applicant and the alleged father, * * *."

We respectfully submit that this Court should determine that the Immigration authorities acted against reason when they decided that the applicants were not the sons of their alleged father.

Hom Chung v. Nagle, No. 6031, C. C. A. 9th, 41 Fed. (2d) 126;

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th;

Nagle v. Dong Ming, 26 Fed. (2d) 438, C. C. A. 9th;

Nagle v. Wong Ngook Hong, et al., 27 Fed. (2d) 650, C. C. A. 9th;

Wong Tsick Wye, et al. v. Nagle, 33 Fed. (2d) 226, C. C. A. 9th;

Gung You v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th;

Nagle v. Jin Suey, 41 Fed. (2d) 522, C. C. A. 9th.

In the case of *Chung Pig Tin v. Nagle,* 45 Fed. (2d) 484, this Court said:

"Before taking up these discrepancies, real or apparent, it may be well to consider the scope of the examination out of which they arose. The testimony of the alleged father taken at Los Angeles, covers upwards of twenty single spaced typewritten pages, and the testimony of the appellant, taken at San Francisco, covers approximately seven pages. The witnesses were interrogated as to their home life and relatives, near and remote; as to the home village; the number of houses in the village; the names of the occupants and the names of their children; the name of the school teacher and the names of his wife and children; the number of children attending school and their names; the ancestral hall, and a multitude of other collateral questions. In all of this testimony there was such general agreement, and the scope of the examination was so broad, as to preclude any reasonable probability of coaching or collusion.

The importance of discrepancies in testimony must be determined from the entire record in the case, and when the discrepancies in question are considered in that light they did not, in our opinion, justify the rejection of all testimony given by witnesses who were not otherwise impeached. As said by this court in Go Lun v. Nagle, 22 F. (2d) 246, 247:

'We may say at the outstart that discrepancies in testimony, even as to collateral and immaterial matters, may be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe the same things, or recall them in the same way, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects. The purpose of the hearing is to inquire into the citizenship of the appli-

cant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship.'

See, also, Nagle v. Dong Ming, (C. C. A.) 26 F. (2d) 438; Wong Tsick Wye v. Nagle, (C. C. A.) 33 F. (2d) 226; Gung You v. Nagle, (C. C. A.) 34 F. (2d) 848; Hom Chung v. Nagle, (C. C. A.) 41 F. (2d) 126.

We will now refer briefly to the discrepancies relied upon. In the matter of the first one, the alleged father was not asked to describe the two small rooms, their size, or the purpose for which they were used, and it may well be that for all practical purposes there was in fact but a single room of any consequence in the ancestral hall. As to the second discrepancy, what was meant by the term 'family' is not entirely clear, nor is it at all certain that the term would include a remote ancestor, such as a great grandparent. In other words, it may well be that the answer of the alleged father was not responsive to the question at all, and if not, the fact that the appellant answered differently is of no moment. The scar on the left temple of the appellant was the result of a wound received by him so early in life that he could not recall when or how the injury was incurred, nor did the alleged father have any knowledge concerning the same. The scar, therefore, was not a matter of great concern, and it would not be at all surprising if, after the lapse of about five years, the alleged father placed it under the left cheek bone instead of on the left temple, or if he was mistaken to some extent as to its size or location. Indeed, the fact that he testified to the scar on the left side of the face would tend to corroborate him rather than to contradict or weaken his testimony. The same may be said in large measure in regard to the delivery of the $60 in Chinese money to the family of the alleged father. We can understand how the appellant may

have had no knowledge of the delivery of the letter, or failed to recall it if he ever had such knowledge. The fact that he had knowledge of the delivery of the $60 would tend to corroborate him, unless it be said that he was coached on this subject. But if coached as to the $60, why not as to the delivery of the letter as well? The fifth discrepancy is still less important. **Surely an American citizen should not be excluded from the United States because he and another witness differed slightly as to whether they parted at the door of the house or at the village gate some years before.**

The Board of Special Inquiry found certain discrepancies to which the Board of Review paid no heed. Some of these are set forth in the brief of the appellee and others have been abandoned. It would serve little purpose to consider or set forth these so-called discrepancies here. Suffice it to say that they are even less important than those we have considered, and, viewing the testimony as a whole, as we must, we are constrained to hold that the rejection of the testimony given by the alleged father and the appellant was neither authorized nor justified.

The order is reversed, with directions to issue the writ as prayed.'' (Boldface supplied.)

CONCLUSION.

Although there are alleged differences pointed out by the San Francisco office, and most of these are abandoned by the Board of Review, these differences as a matter of fact do not amount to differences in this case, and for three important reasons these differences should not be given any serious consideration.

First. Because the record itself shows there was difficulty in understanding between the interpreters and the witnesses.

Second. Because the agreements on the essential and connecting facts destroy the effect of the differences.

Third. For the reason notwithstanding the fact there is agreement on the surrounding and connecting and incidental circumstances on every discrepancy pointed out by the San Francisco office, **at no time was the father or either one of these applicants recalled and taken over any of these alleged differences.** The fact that there is agreement on the connecting and incidental circumstances which actually eliminated the differences, either demanded a recall of the witness in question, or elimination of all objections to the case.

Having failed under such circumstances, (especially where the record shows lack of understanding between the interpreters and the witnesses) even to recall any one of the witnesses makes it unfair to hold that such minor points should be determinative of the issues in the case. We would respectfully request this Court to make its order reversing the lower Court, and that the writ be granted.

Dated, San Francisco,
October 3, 1931.

Respectfully submitted,
J. H. Sapiro,
Attorney for Appellants.

No. 6490

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

SEATTLE TITLE TRUST COMPANY, as Guardian of the Estate of VERNON A. PETERSON, Incompetent,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington. Northern Division.

Parker Printing Company, 545 Sansome Street, San Francisco 7-18-31—60

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

ANTHONY SAVAGE, Esquire, and CAMERON SHERWOOD, Esquire, Attorneys for Appellant, 310 Federal Building, Seattle, Washington.

LESTER E. POPE, Esquire, Attorney for Appellant, 800 Liggett Building, Seattle Washington.

Messrs. WETTRICK, WETTRICK & FLOOD, Attorneys for Appellee, 805 Arctic Building, Seattle, Washington. [1*]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 20205.

SEATTLE TITLE TRUST COMPANY, as guardian of the Estate of VERNON A. PETERSON, Incompetent,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

Comes now the plaintiff and for a cause of action against the defendant, alleges as follows:

I.

That the plaintiff at all times herein mentioned was and now is a corporation duly organized and

*Page number appearing at the foot of page of original certified Transcript of Record.

existing under and by virtue of the laws of the State of Washington, and has paid all license fees and taxes due the state. That plaintiff is the duly appointed and acting guardian of the estate of said Vernon A. Peterson, incompetent, by virtue of an order of appointment of the Superior Court of King County, Washington.

II.

That the said Vernon A. Peterson enlisted in the military service of the United States on November 30, 1917, and was honorably discharged therefrom on the 1st day of January, 1919.

III.

That on or about the date of his enlistment the said Vernon A. Peterson applied for insurance against the risks and hazards of war and received a policy for $10,000 of war risk term insurance, which provided that in the event he should become permanently and totally disabled during the lifetime of the policy from pursuing continuously any gainful occupation he should receive the sum of $57.50 a month, so long as he should live. That on or about the date of his discharge, the exact date being known to defendant herein, the defendant terminated the policy of insurance for the failure of said Vernon A. Peterson to pay the premiums thereon, but that said termination was wrongful and void by reason of a total and permanent disable- [2] ment which caused his policy to mature and which entitled him to the total and permanent benefits thereunder.

IV.

That during the military service of said Vernon A. Peterson, and while the said policy of war risk insurance was in full force and effect, he suffered from an enlargement of the lymphatic glands, disfunction of the cervical glands and that he further suffered a mental disorder and from mental deterioration, nervous prostration and neurestheniа, which rendered him totally and permanently disabled, and that from and after the date of his discharge from service he has suffered continuously from these diseases and their after effects and sequellae, and that notwithstanding repeated honest and conscientious efforts to work he has been unable to earn his livelihood, and plaintiff has been informed and believes that these disabilities are likely to continue throughout the lifetime of the said Vernon A. Peterson.

V.

That plaintiff has exhausted all and sundry his rights of presentation and appeal in and with the United States Veterans Bureau and has made demand for the payment of the sums due said Vernon A. Peterson under his insurance contract, but that said Bureau has failed and refused to pay the same and plaintiff is informed and believes that a disagreement exists.

WHEREFORE Plaintiff prays judgment against defendant in the sum of $57.50 a month from date of discharge of the said Vernon A. Peterson until date of judgment herein, and for $57.50 per month

thereafter so long as said Vernon A. Peterson shall live, as provided by law, and for its costs and disbursements herein.

CHRISTOPHERSON & NEWMAN,
WETTRICK & WETTRICK,
Attorneys for Plaintiff,
805-808 Arctic Bldg.,
Seattle, Washington. [3]

State of Washington,
County of King.—ss.

Harold V. Smith, being first duly sworn, on oath deposes and says: That he is the Assistant Trust Officer of the Seattle Title Trust Company, of Seattle, a Washington corporation, the duly appointed guardian of the estate of Vernon A. Peterson, incompetent, that he executes this oath on behalf of said corporation, being authorized so to do; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

HAROLD V. SMITH.

Subscribed and sworn to before me this 27th day of May, 1929.

[Seal] FRANK R. MURTHA.
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed May 29, 1929. [4]

(Title of Court and Cause.)

ANSWER.

Comes now the United States of America, defendant, by Anthony Savage, United States Attorney, Tom DeWolfe, Assistant United States Attorney, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows, to-wit:

I.

Answering paragraph I of plaintiff's complaint, defendant states that it has not sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations therein contained, therefore denies the same.

II.

Answering paragraph II of plaintiff's complaint, defendant admits that Vernon A. Peterson enlisted in the military service of the United States November 30, 1917, and that he was honorably discharged therefrom on January 25, 1919.

III.

Answering paragraph III of plaintiff's complaint, defendant admits that plaintiff applied for and was granted war risk insurance in the amount of $10,000, payable in [5] monthly installments of $57.50 in the event of insured becoming permanently and totally disabled, or in the event of his death, while said insurance contract was in force and effect;

denies each, every and singularly the remaining allegations in said paragraph contained.

IV.

For answer to paragraph IV of plaintiff's complaint, defendant denies each, every and singular the allegations in said paragraph contained.

V.

Admits paragraph V of plaintiff's complaint.

FOR a further answer and by way of a first affirmative defense, Defendant doth allege as follows, to-wit:

I.

That Vernon A. Peterson, the insured, enlisted on November 30, 1917, and was honorably discharged from service on January 26, 1919; that on December 10, 1917, insured applied for and was granted war risk term insurance in the amount of $10,000.00, which insurance lapsed for non-payment of premium due February 1, 1919, and was not in force and effect thereafter.

WHEREFORE, having fully answered the complaint of the plaintiff herein, defendant prays that the same be dismissed with prejudice, and *it* that it may recover its costs and disbursements herein to be taxed according to law. [6]

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

United States of America,
Western District of Washington,
Northern Division.—ss.

Tom De Wolfe, being first duly sworn, on oath deposes and says: that he is Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America; that he has read the foregoing Answer and First Affirmative Defense, knows the contents thereof, and believes the same to be true.

TOM De WOLFE.

Subscribed and sworn to before me this 27th day of November, 1929.

[Seal] S. M. H. COOK,
Deputy Clerk, U. S. District Court, Western District of Washington.

Received a copy of the within answer this 27th day of November, 1929.

WETTRICK & WETTRICK,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 27, 1929. [7]

(Title of Court and Cause)

REPLY.

Comes now the plaintiff and for reply to the answer of the defendant filed herein, affirms and denies as follows:

I.

Plaintiff denies that the insurance described in the answer of the defendant lapsed on February 1, 1919, but affirms that the same expired on or prior to that date by reason of the happening of total and permanent disability, as set forth in the plaintiff's complaint.

WHEREFORE plaintiff prays for judgment in accordance with the prayer of its complaint.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Plaintiff.

State of Washington,
County of King.—ss.

George E. Flood, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the plaintiff corporation, and makes this verification for and on plaintiff's behalf because no officer of said corporation is now present; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true.

GEORGE E. FLOOD.

Subscribed and sworn to before me this 10th day of March, 1931.

[Seal] F. J. WETTRICK,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed March 10, 1931. [8]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find for the Plaintiff and fix the date of the total and permanent disability of Vernon A. Peterson on or before midnight of February 28, 1919.

FRANK WRIGHT,
Foreman.

[Endorsed]: Filed March 12, 1931. [9]

United States District Court, Western District of Washington, Northern Division.

No. 20205.

SEATTLE TITLE TRUST COMPANY, as guardian of the estate of VERNON A. PETERSON, Incompetent,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above-entitled cause having come on duly for trial on the 10th day of March, 1931, before the Hon. Jeremiah Neterer, one of the Judges of the above-entitled Court, the plaintiff appearing by agent and by its attorneys Lee L. Newman and Wettrick, Wettrick & Flood, and defendant appearing by Anthony Savage, United States District At-

torney, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, the trial having been had before a jury, which said jury returned a verdict in favor of plaintiff to the effect that Vernon A. Peterson, its ward, was and at all times herein has been a resident of the State of Washington, Western District, Northern Division; that said ward served in the Army of the United States in the war with Germany from the 30th day of November, 1917, to the 1st day of January, 1919; that he was issued a war risk insurance policy of government life insurance in the sum of Ten Thousand ($10,000) Dollars free of all liens and encumbrances, upon which premiums were paid to and including the month of February, 1919. That the said insurance was and is payable in installments of $57.50 per month commencing on the 28th day of February, 1919, upon which date and since which time plaintiff's ward was and has been permanently and totally disabled. NOW, THEREFORE, it is

ORDERED, adjudged and decreed that plaintiff for its [10] ward recover of the defendant the sum of $8,337.50, which sum represents payments accrued and due under the said insurance policy at the rate of $57.50 per month commencing February 28, 1919, and continuing to and including the 10th day of March, 1931, the date of verdict herein, said payments to be made as by law in such cases provided; and it is

FURTHER ORDERED, ADJUDGED and DECREED that Lee L. Newman be and he hereby is entitled on behalf of Lee L. Newman and Wettrick,

Wettrick & Flood, attorneys for plaintiff herein, to receive from said judgment as a reasonable attorneys' fee for services in the above-entitled cause the sum of $833.75, which sum is ten per cent. (10%) of the said $8,337.50, and that he be and hereby is entitled to receive the further sum of ten per cent. (10%) on each and every payment made by defendant to plaintiff's ward, his heirs, executors or assigns, in consequence of or as a result of the entry of this judgment, said payments to be made as by law in such cases provided, to all of which exception is hereby allowed to the defendant.

DONE in open court this 3rd day of April, 1931.

JEREMIAH NETERER,
Judge.

Received copy of the within Judgment this 2nd day of April, 1931.

ANTHONY SAVAGE,
Atty. for Deft.

O. K. as to form

LESTER E. POPE,
Atty U. S. V. B.

TOM De WOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Apr. 3, 1931. [11]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attor-

ney for the Western District of Washington, and Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and petitions the above Court for an order granting a new trial in the above entitled cause, for the following reasons, to-wit:

(1) Error in law occurring at the trial and duly excepted to by the defendant.

(2) Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Atty.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within motion for new trial this 20 day of Mar., 1931.

GEO. E. FLOOD,
Attorney for Pltff.

[Endorsed]: Filed Mar. 20, 1931. [12)]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL.

THIS MATTER having come before the above entitled Court on the motion of the defendant herein, for a new trial, and both parties having submitted

said motion to the Court for ruling thereon, without argument, and the Court being duly advised in the premises; now, therefore, it is hereby,

ORDERED and ADJUDGED that the defendant's motion for a new trial herein be, and the same hereby is, denied, and an exception is noted on behalf of the defendant.

DONE in open Court this 1st day of April, 1931.

JEREMIAH NETERER,
United States District Judge.

Approved:

WETTRICK, WETTRICK & FLOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 1, 1931. [13]

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore and on, to-wit, the 10th day of March, 1931, at the hour of 10 o'clock, A. M., the above entitled cause came regularly on for trial before the Honorable Jeremiah Neterer, one of the judges of the above entitled court, sitting with a jury, in the north court room of the Federal Building, Seattle, Washington; the plaintiff appearing by George E. Flood and Lee L. Newman, its attorneys and counsel; the defendant appearing by Anthony Savage, United States At-

torney, Cameron Sherwood, Assistant United States Attorney, and Lester E. Pope, Regional Attorney for the United States Veterans Bureau, its attorney and counsel;

WHEREUPON, a jury having been empaneled and sworn, and opening statements having been made by counsel for the plaintiff and for the defendant, the following proceedings were had and testimony taken, to-wit: [22]

HAROLD B. SMITH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My full name is Harold B. Smith. My business is that of Trust Officer, Seattle Title Trust Co., formerly the Seattle Title Company. The Seattle Title Trust Co. is the guardian of the Estate of Vernon A. Peterson.

Mr. NEWMAN.—We have here a certified copy of the order of appointment.

The COURT.—Very well. Let it be filed.

(Whereupon Plaintiff's Exhibit No. 1, being a certified copy of order of appointment of guardian, was admitted in evidence.)

I have been connected with and have acted as Trust Officer of the Seattle Title Trust Company since the appointment of the company as guardian of the estate of Vernon A. Peterson. The company has been acting as guardian since the time of the appointment.

(Testimony of Harold B. Smith.)

Cross examination by Mr. POPE.

My company is operating a trust business.

RUTH PETERSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is Ruth Peterson and I am the wife of Vernon A. Peterson, now a ward of Seattle Title Trust Company. Mr. Peterson and I were married at Camp Lewis, Washington, in 1918. He was there until January 25, 1919. I was living with my parents until his discharge January 25, 1919. My parents resided in Seattle in Georgetown. I saw him many times after my marriage until his discharge. He came in from Camp Lewis. I couldn't say how often it was. We were [23] married November 15, 1918, and he was discharged January 25, 1919. He was stationed in Camp Lewis all the time he was in service so far as I know. I didn't go down to Camp Lewis except once, and that was before we were married. He visited me every week, as often as he could get away or get a pass. I would say once a week. As soon as he was discharged we went to San Jose and then to Santa Cruz. We visited his mother in San Jose just a short time. We were in Santa Cruz over a period of a couple of months. He was with me all the time we were in San Jose and Santa Cruz. From Santa Cruz I went to San Jose and he went to Los Angeles. He wrote me many letters

(Testimony of Ruth Peterson.)

from Los Angeles, and was supposed to send for me. I was in San Jose. When I went down to Los Angeles he didn't have any work. He worked for a short time right after I got down there loading cars. He worked at that not very long, around a couple of weeks—something like that. During the time he was employed in Los Angeles he was very nervous. He would pace up and down the room. He would go out of the house and wouldn't seem to know where he left things. (Answer of witness as to inability of her husband to find things stricken by the Court).

After he had eaten his supper he would faint away—fall out of his chair. He would topple over that way. That condition would continue for several minutes. He would finally get out of it and would be out of his head altogether. He would act dazed. (Court strikes out answer as to dazed condition). Plaintiff objects, exception allowed. He was very pale. He had a glary look in his eyes. His eyes were inflamed. He would look straight out. When he went to bed he would sleep the rest of the night. He would get up and try to work the next morning. He went to work then. He would go to this company loading cars for them. I do not know what company. He worked there to my [24] knowledge a couple of weeks. He had fainting spells when he would come home in the evening after dinner. They would come in succession. He had three in succession. Three days in succession, night after night. I don't think they recurred afterwards. That

(Testimony of Ruth Peterson.)
was the only time he had fainting spells. After he quit his job we returned to Seattle. After he had fainting spells he was out of his head and made strange gurgling sounds. When he first came out of it he was nauseated. He was very nauseated. I don't recall whether he vomited. He complained of being very sick after these spells. He had these fainting spells before he quit.

When we came to Seattle we lived with my parents, Mr. and Mrs. St. Michel, about a month. He didn't work during that time. After we returned from California he started to look for work in about a month and went to work on a street car as conductor for the City of Seattle. He went to work around in July of 1919. He worked there about two months on the street car. He had broken shifts with no definite hours. The shifts varied—most of his shifts were at night, and he usually went to work at twelve o'clock at noon. He would work over a period of probably four hours—varying from day to day. As a rule he came home late at night, about one or two o'clock, and he then would go to bed. He would get up at ten o'clock in the morning. He would eat at eleven in the morning. He ate all of his meals out except his breakfast, because he wasn't at home. He was out of bed practically every day on his feet. He worked quite steady—as often as there was work for him on the extra list. At home he slept until about ten in the morning, and while he was on the street car he wasn't home to speak of in the daytime. He was transferred from the street

(Testimony of Ruth Peterson.)

car to the Georgetown car barn where he was head mechanic. He [25] continued there for about six months. He went to work each morning at eight o'clock. He worked eight hours. His work was quite steady. It continued about six months. He took his meals at home. He ate his meals regularly, morning, noon and evening. He spent his evenings at home. He was very nervous in the evening. He would pace back and forth—go to one chair and sit in it, then pace back and forth, then to another. He was extremely nervous. He usually went to bed early, about nine o'clock. He would get up at 6:30. The balance of the family retired about the same time, and all got up about the same time. I was never in the car barn while he was working there. He would pace around the room, back and forth. Back and forth. On the go continually. He did not sit down. I did not see him make change. I did not ride on the street cars with Mr. Peterson. I do not remember that he missed any meals when he came home.

He didn't go to a doctor in that time if I remember. He had a peculiar expression from his eyes. It was glassy and very stary. The eyes would bulge. Outside of being extremely nervous, pacing back and forth, back and forth, I have nothing definite in mind. He stammered quite a bit.

After working in the car barn he went into a garage on Corson and Duwamish Avenue. The building wasn't as large as this room. He only had a handful of tools. He was in there two months. He never had but one car in there. I was in the

(Testimony of Ruth Peterson.)

garage frequently. He had one car to repair while he was in there, and when he finished it, it would not run. I saw him work on the car. He was very awkward in picking up the tools. He worked on the car. I am not familiar with the tools he used. After he got a regular set of tools he had to leave the garage. He wasn't at the garage all the time. I would go down there when he wouldn't be [26] there. I don't know where he was. This was during business hours. He was in the garage about two months. After leaving the garage business Mr. Peterson didn't do anything for a few months, and finally he went to the Mission Theater. He stayed with me in the interim. He was very nervous. He would start to do one thing, and then forget all about it, and then do something else. He would start to pick up something and couldn't find it. He ate his meals regularly, went to bed about the same time as the family did. He regulated his habits with relation to meals, sleeping, and so on, the same as the family did. He was always on his feet in the daytime. Always pacing back and forth, back and forth. He was in the show business from May 1, 1921, to the middle of 1924. He wasn't home very much. He went into this theater. I would go with him to the theater and then go with him to get the films. He would go into the film exchange with the films for the night before and get advertising and films into the car and we would go back. We had everything written down for the night's performance, and I would watch to see that he got everything for the night's business. I didn't go into the

(Testimony of Ruth Peterson.)

film exchange, but I would check to see if he had everything. He was working in the capacity of janitor in the theater and seeing that the show was clean for the evening. He had a partner who was in California. The partner did the managing. I was with him every day and saw that everything was ready. He would just sweep up and dust the chairs and see that the films were put in the operating room for the operator. He would start the fire and see that the show would be warm. He would get home about eleven o'clock. I had little children and I could not keep them out. I had the first child November 15, 1919, the next one March 30, 1921, the next one June 1, 1922, the last [27] one February 1, 1924. His whole ambition was to make a living. He was attached to the children.

Mr. Lilly had charge of running the show business. He was the partner. I went along to see that the necessary things were taken and done for the evening show. Sometimes he would not return with the proper materials. Before starting to go with him he would go to town and not bring back the necessary pictures for the show, and we would be unable to start. I know that he would not bring back the pictures. He was supposed with respect to his duties at the show to look this up. In the evening if someone wasn't there to watch him he would leave the front and back doors wide open, and many times he left his night's receipts in the box office window. It was part of his duty to put the money away. This conduct continued all the time he was in the show. The Mission Theater is

(Testimony of Ruth Peterson.)

in Georgetown. At the Mission Theater he would pace up and down the aisles, back and forth.

After he left the Mission Theater he went south to visit his mother in San Jose. He didn't do much of anything in California. He was nervous on the train, and the muscles of his face would twitch in every direction, and he had a stroke while he was in the theater afterwards, on the side. That was in 1923. He went to a chiropractor. I do not know where the chiropractor is. Sometimes it would strike his tongue and sometimes he could not talk. Sometimes it would strike his hand. It would be just paralyzed for the period. Sometimes that would last half an hour or three quarters of an hour. Very frequently. They lasted for about a year. He was in California just a short time. He went back in the Ruston Theater in Tacoma. He left the house with the car and I didn't see him for a period, and then he came back— [28] He was gone a couple of weeks, and I had to run the theater in Tacoma and take care of the children, and when I would tell him he would have to help he would pout, and one night he came into the theater without any trousers on. That was in 1925. We had rooms in the theater. He came into the theater when I was playing the piano and stood right in the light of the lamp, so there was a full view. I said "Why did you do that?" He said he didn't do anything. His mind seemed to be blank. There wasn't anything there. It didn't seem to affect him. He didn't seem to know what happened, and then I finally made him go to bed. The next day I talked to him

(Testimony of Ruth Peterson.)

about it, but it didn't seem to affect him in any way. I would ask him to put the car away, and then he would go into the theater and peek around the curtain and see if I was watching him. I was afraid people would see him and they would pick him up, and I talked to him and told him he could not go without his clothes, and he said, "I will go out there without any clothes on." This continued all the time we were in the Ruston Theater—about three months. Then we came back to Seattle. He tried to work. I couldn't tell you just where he applied. I didn't see him work. Each time he would say he had a job, and he only lasted about an hour on a job. That continued until he was put in the hospital. I think that was in the fall of 1925. I have seen him since. He is at the hospital for the insane at American Lake. They are giving him a few things to do to keep their minds busy. He does only little things. He recognizes me and wants to show me everything like a little child. I have taken the children over there. He is glad to see the children, but he is more like a child than the father. He has come home on furlough from time to time. At one time he was home for over a period of eight months. [29] He would fly into rages toward me, and he came after me with a butcher knife, and then another time he came after me with clenched fists, and if he wasn't pampered I could not stay with him, and I humored him on every occasion. He was home on Washington's birthday for three days. He would roam around the house at night and just run

(Testimony of Ruth Peterson.)

around. I do not know that he went on the street without clothes. He would be always hovering over my bed. I reported his conduct back to the hospital.

Cross Examination by Mr. POPE.

The first time we went to California was in 1919. I don't remember that it was the Southern Pacific Railway Company he was working for. We went to California in 1919 on the train and came back on the train. When we went to California in 1924 we drove a car. I drove most of the way.

That is my signature on defendant's Exhibit A-1. That is my signature on defendant's Exhibit A-2. I know Mr. Clemenson, a Notary Public, before whom Exhibit A-1 was sworn to by me. He was connected with the American Legion. I don't remember signing this. As I recall, I went to Mr. Flood in connection with my claim for compensation. I remember of seeing Mr. Clemenson at the office. I don't remember signing defendant's Exhibit A-2 before Mr. Knapp. I remember Mr. Knapp. Mr. Knapp was a service officer.

When my husband came back to Seattle he went to work for the Seattle Municipal Railway. I can't remember the exact date he went to work. I think it was some time in July. I couldn't give you the exact date, but I didn't think he worked from July, 1919, up to the first half of June, 1920. It might have been. I couldn't state positively. [30] He went to work in this garage as soon as he quit the Seattle Municipal Railway. He made arrangements to purchase the garage before he quit the Railway

(Testimony of Ruth Peterson.)

Company. He went to work from the Seattle Municipal Railway Company right into the garage within a few days. He wasn't in the garage over two months. The next employment was the Mission Theater. I think that he started running the Mission Theater later than November, 1920. I thought it was in 1921. I could not give you the exact dates. He stayed in the Mission Theater until about September, 1924. The first partner my husband had in the Theater was Mr. Woodhouse. About February 20, 1921, the partnership with Mr. Woodhouse was dissolved. I don't know the exact date. He wasn't with Mr. Woodhouse very long. Woodhouse was never in the theater himself. It was in the hands of a receiver for winding up the business of the partnership. There was two theaters. He was alone in the old theater. The second partner was Mr. Lilly. I don't know where Mr. Lilly is. Mr. Lilly was there from 1921 up to some time in 1924. I think. I think about April, 1924, my husband signed a contract for the purchase of a new building for the theater. He didn't purchase anything. I would say that he did not have $5900.00 to pay down on the new theater building. I don't know what the price was. After the down payment the rate of pay was $400 per month. Mr. Lilly did not continue as a partner in the new theater. Just my husband from April, 1924, until September, 1924. I don't have the books showing the receipts in the business for that time. I could not tell you what the receipts of the business were at that time. I would

(Testimony of Ruth Peterson.)

not say the receipts were twenty five hundred dollars a month. Probably about eighteen hundred. I don't imagine they ran over that. The amount of the business that was [31] being done at that time,—it has been a long time ago. I could not give you any exact figures.

After leaving the Mission Theater in September, 1924, we went to California. I think my husband came back in December, as near as I can recollect. He ran a theater in Ruston near Tacoma, about March to June, 1925.

(Defendant's Exhibits A-1 and A-2, being affidavits, were received in evidence and read to the jury.)

As I recall, the theater we ran in Ruston was operated from March to June, 1925. He made a claim to the government about September, 1925. He was in the hospital after that for a time. He has been in the hospital periodically since that time. I don't remember the date he worked for Love & Company, but he worked for them operating a sawdust burner on one of his furloughs from the hospital. He worked as janitor of the Seattle Office Equipment Company for some time, but the date I could not give you. I imagine it was in 1929. It probably was for about eight or nine months. He was treated by a chiropractor in 1923 and after that he probably was treated by our family doctor, Dr. Guthrie, in 1923. Dr. Guthrie attended me at the time of the birth of my children. I don't know whether Dr. Guthrie is still in town.

(Testimony of Ruth Peterson.)

Redirect Examination by Mr. NEWMAN.

It is a fact that the show was in Ruston and not in Renton. The new theater building referred to in my previous testimony wasn't worth $15,000. I saw the contract. He didn't pay down fifty nine hundred dollars because he didn't have it. He didn't pay $400 a month on the contract because he was very much behind in his payments. I was fully familiar with the facts of the new theater. I knew of the arrangements with respect to the building, the contract and [32] the contractor himself. I have testified that I signed both the affidavits marked as defendant's Exhibit A-1 and defendant's Exhibit A-2, wherein I stated that during 1919 my husband was bright, keen, full of life, active and intelligent. I ran the theater at Ruston in 1925.

Mrs. JENNIE POWERS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

I am Mrs. Jennie Powers, and I reside at 961 Harney, at Seattle, in Georgetown. I am an aunt of Mrs. Peterson. Her mother was my sister.

I knew Mr. Peterson when he came back from the army after his discharge in 1919. He came to our house, to my sister's house. I was living there at the time. Well, he would pace the floor, sit on one chair, get up and then sit in another. He had a

(Testimony of Jennie Powers.)

glassy look out of his eye. I wasn't there when he ate or when he slept. I didn't know Mr. Peterson very well. I met him two or three times. I only met him once or twice before his discharge. I didn't live at the house. I believe just once. I just met him. He said "How do you do?" and then he walked off, and then first sit in one chair and then in another. I can't describe how he did act. He was very nervous. That is all. Standing in front of you, and kept talking about what he was doing—what he was going to do. He was with me but a few minutes and he got up and left. I didn't meet him again until he came to my house and lived. That was in June, 1919. At that time he paced the floor and walked around. He would walk around as though he didn't know me. I would speak to him and he would not answer. He just looked at me. I may [33] or may not have introduced him to someone. I did not introduce him to my present husband. He was forgetful. He would make two or three trips to the house to get what he was looking for. When he was working on the street cars he would start out to work and then come rushing in for something and then go back and then come back again. I asked him what he wanted and he wouldn't pay any attention but go back to the apartment and then go to his work. I saw him do this a couple of times. At different times I would meet him on the street and he would not speak to me. He would look at me and then look down. It seems as though he would not see me or hear me. That was in June, 1919. He was at our home about a

(Testimony of Jennie Powers.)

month. I saw him quite some time after he left my home because I was working at the time and wasn't around that part of the time. It was about a month later. He acted about the same. They went to California shortly after he was discharged from the army. The second time in 1924 or 1925. He acted about the same the next time that I saw him. I knew Mr. Peterson and had an opportunity to observe him while he was in the show business. He went into the show business in 1921 or 1922. He acted about the same. I had a confectionery stand in the show house. He would run up and down the aisle, apparently not noticing anyone in particular. He didn't have anything to do in particular. He seemed to be busy doing nothing. I did not see him after the theater closed in the evening. [34]

Mr. W. J. POWERS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is W. J. Powers. I am the husband of Mrs. Powers who just testified a moment ago. I am related by marriage to Vernon A. Peterson. I knew Vernon A. Peterson. I first met him in 1921. He would act kind of funny. He would stand talking to you and all at once he would walk away and pretend there was no one there at all, and then ten minutes afterwards he would pay no attention to

(Testimony of W. J. Powers.)

you. I put him down as a nervous wreck. That occurred at different times. I met him a dozen times or more. Sometimes he would come up and make a big fuss over me, and then a little later he would not know me. That was on the street. Later on I met him at my wife's home four or five years later. He was committed to the hospital then. I was friendly with him. Friendly as I could be. I do not know what his actions toward his wife and family were.

Cross examination by Mr. POPE.

The first time I met him was in 1921. Late in the summer, July or August.

W. J. CAREY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is W. J. Carey. I am a sergeant of Police, stationed at the Wallingford Police Station. I was stationed at Georgetown and went there September 3, 1922. I knew Vernon A. Peterson after I came to Georgetown. I was in charge of the station at nights, and he came up to make complaints. I investigated the complaints. He acted as though he was hopped up. He acted like a hophead, like a man full of dope. He had his clothes on when he came in. He had on khaki, soldier's pants or breeches, vest, a soft shirt, and about three or four

(Testimony of W. J. Carey.)

days growth of beard on his face. That was when he was running the show. I knew something about the theater other than as an official. I met Mr. Peterson from day to day. When I went down to the theater he seemed to be in charge. He put out the posters in front. He would have a show going on and the wrong posters there. The posters indicated the show that was going on in there. There were posters out at times of shows that had not been run at all. I could not say when this was. It was in 1923, I believe. I saw him run in the theater, run up and down the aisles. I was in charge of the precinct. I went there in the night time. I found there was a police padlock on the theater.

Cross Examination by Mr. POPE.

The first time I knew him was in 1922. I became better acquainted with him in 1923. I went there in September, 1922. These instances I spoke of occurred in 1922, 1923 and 1924. I became better acquainted with him in 1923. Some time in 1923 I first noticed the posters. [36] I noticed these police padlocks on the door the same time I was out there. I had not seen anything like that prior to 1923. He seemed to be directing the affairs of the theater while I was around there. He seemed to be in general charge of the theater. I would judge the theater would seat about 250 or possibly 300 people. The old theater, that is. He had a pretty good crowd there.

W. J. JONES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is W. J. Jones. I am a police officer at Georgetown precinct No. 3. I have been there about seventeen years. I know Vernon A. Peterson. I first met him in 1921. It was when he was in the old theater. I had an opportunity to observe him at that time. He was very flighty. He would talk to you on one subject and change off to some other subject. He was always after the police to clear up the place. He said boys were bothering him, and the boys were two or three blocks from his place. I made an investigation. He was always excited in the theater. At times he was awful excited and would speak to no one. Very flighty. He would come to the police station and make complaints about the boys at night. I investigated. This occurred about four or five times in 1921 and 1922. I observed him in 1922 and 1923 several times. His conduct then was about the same. In 1923 and 1924 he commenced to be in very bad shape. Less bright, growth of beard on his face, clothes half off. I did not have any knowledge with respect to the closing of the theater. [37]

Cross Examination by Mr. POPE.

I saw him in the theater in 1922 and 1923. In 1924 I saw him after he got out of the theater. I did not see him after the latter part of 1924. He

(Testimony of W. J. Jones.)

used to run around through the aisles during the time I saw him at the theater. It seemed like he was in charge of the theater. Most of the time the theater was pretty well filled up. In 1923 and 1924 he got in rather bad shape. He was different in 1921. Later he became very shabby in his appearance. He was very neat in 1921. I didn't notice that he was shabby then. He was about the same in 1922. It was only in 1923 or 1924 that I began to notice that he got shabby.

EMIL ST. MICHEL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

I know Vernon A. Peterson. My name is Emil St. Michel. I first became acquainted with him in 1918. I met him when he was coming out to the house the first time. I saw him with consistency after that time. Sometimes he would come in the house and didn't look at me at all. He would just go right by and it looked to me that there was something wrong with him. The first time I saw him I didn't pay any particular attention to him. He would come up to the house. He would go right by and didn't say anything to me half the time. Sometimes I would see him and speak to him, and he would just look at me and turn his head. He would have an opportunity to see me. He did so many things that I didn't pay any attention. Sometimes when he ran

(Testimony of Emil St. Michel.)
the show he would go to buy films and after he bought the films he would forget. He came and asked me to get the film and [38] the film store had closed. He didn't have any film to start his show, and I went after the film myself. I believe the last time I saw him was Christmas.

Cross Examination by Mr. POPE.

I am related to Mrs. Peterson. I am his step-father-in-law.

Mr. W. A. SCHLAX, recalled as a witness on behalf of the plaintiff, testified as follows on

Direct Examination by Mr. FLOOD.

Dr. Quilliam is a Bureau doctor, and that is a Bureau examination, the examination of September 3, 1925. The next examination is of September 11, 1925, by Dr. Smythe and Dr. Melvin. I don't know whether or not Dr. Smythe and Dr. Melvin were Bureau doctors. This is taken from the Bureau records. The next date I have here is March 14, 1926. Dr. Ernst made that report. That is the report of the examination made at the United States Veterans Hospital. The next report is of April 12, 1926, by Dr. R. H. Rea. That is supposed to be a report of a Bureau examination. The next report is dated June 4, 1926, by Dr. D. G. Dickerson. That is a Bureau report. The next examination was on October 7, 1926, and on April 18, 1927, and on October 20, 1927 by Dr. L. F. Wood. I believe other

(Testimony of W. A. Schlax.)

doctors joined with me on the examination of October 20, 1927. The next report I have is of May 21, 1927. Those are likewise reports of the United States Veterans Bureau or its hospital. There are reports for July 27, 1928, October 25, 1928, March 29, 1929, January 13, 1930. That is everything except the examination of October 20, 1927, which is right here. Those are all taken from records of the Veterans [39] Bureau.

(Plaintiff's Exhibits 2 to 15, inclusive, offered, received and read in evidence)

Dr. E. A. NICHOLSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. FLOOD.

My name is Dr. E. A. Nicholson. I am a physician licensed to practice in the state of Washington. My work is limited to nervous and mental diseases entirely. I have had occasion to examine Vernon A. Peterson on the 20th of August, 1925, April 8, 1926, and on December 12, 1929. On the date of the first examination I found a slurring of speech, slight irritability, and tendency to forget. I had a Wasserman made and the report was two plus. Positive evidence of syphilis. A two plus is a mild case of syphilis. Three plus is stronger and four plus is the strongest. On two plus alone you would not be justified in saying that he had syphilis, but

(Testimony of Dr. E. A. Nicholson.)

from the history, the slurring of speech and the increased reflexes, I did express an opinion that he had cerebro-spinal syphilis, or a bit more definite, cerebro-spinal paralysis. There are subdivisions of that, and following that and later reports I felt that he would come under one of the general subdivisions, namely, general paralysis of the insane, or paresis. That is a disease of the brain and spinal cord, caused by syphiletic infection. I think we always find a syphiletic history of the general paralysis of the insane. It is a general condition which involves the brain through the blood vessels. As a result of this infection it may involve one part of the brain more than some other part, but because it is likely to involve all parts of the brain, it is spoken of as general paralysis of the insane. [40] The physical symptoms are changes in the reflexes, and there are mental conditions. They become unsteady; there is a trembling speech and becomes rather indefinite and slurring; we find when they are writing they leave out letters. The majority of the paretics are exalted in their ideas. They have big ideas as to their ability to do things and they have big schemes as to their future. There is a type—a small percentage—who are depressed and quiet, and they tend to dement quite rapidly until they become insane. There is a general weakening of the mental faculties, and a general weakening of the physical individual. They become finally bedridden, lose control of the bladder, and, as I say, general paralytics in every way. Neuro-syphilis is a syphilis of the ner-

(Testimony of Dr. E. A. Nicholson.)

vous system. Cerebro-spinal syphilis means that you have syphilis both of the brain and of the spinal cord. If you put in beginning paresis, it would mean to show it is more definitely confined to that disease. Loquaciousness with respect to cerebro-spinal syphilis means that they talk a lot. I don't know what mild euphoria means. Syphilis tertiary is the third stage. We class syphilis in different classes according to the stage of the infection. Beginning from the first stage of infection where we find the source of infection. Some weeks later, we find there is evidence of a general systematic involvement, and we have eruption appearing on the body, and we class that as the second stage of syphilis. The third stage is what occurs weeks or months later and remains the life of the individual. As soon as the syphilis reaches the last stage it may attack the liver, heart, skin, spinal cord, brain; you may have it in any part of the body; but if you have neuro—it means nerve syphilis. It means that he has had syphilis for a long time and is showing evidence of involvement of the [41] nervous system. General paralysis of the insane and paresis are the same. The word "paresis" is usually used for short. Scanning or slurring of the speech means the dropping of syllables. These people do not seem capable of enunciating clearly. They will leave out syllables in certain phrases. The word "Grandiose" means "grand idea." He has a grand idea of himself. It means his emotions are unstable. He may laugh or cry and his emotions are unstable. Social inadaptability is

(Testimony of Dr. E. A. Nicholson.)
the inability to adapt oneself to the surroundings or particularly those in your social connections with other people. Loss of memory is more likely to be for present events. The reason is that, at present, they are incapable. They do not seem to get the time and distance and place properly, while in the past, when there was no impairment there, the brain cells would record the events more clearly. Mental deterioration means a breaking down of the mental faculties of the person. Inability to conduct mental problems in a normal way. That is incident to paresis in the later stages. Mental deterioration of the volitional feeling is practically the same thing. It is not the emotions, but it is more to your desire to act, and the other is more to your conduct. You may or may not find a positive Wasserman in cases of paresis at all times. You may find a blood Wasserman without a positive finding in the spinal cord. That would be a rare condition, and would make you doubt whether the man had paresis, unless, at the same time, you found a positive in the spinal cord. You may find a negative blood Wasserman and the spinal fluid positive. You might later find a positive Wasserman even though you first found a negative Wasserman in connection with the treatment of paresis. In some of the paretics regardless of treatment the fluid remains positive. If you stop treatment you find that [42] the blood or spinal fluid becomes positive.

I felt at the time I first examined him that he was not fit to take up any work, as he could not be

(Testimony of Dr. E. A. Nicholson.)

depended upon. General paresis of the insane is a permanent disability—a progressive disease. Yet, we do find in most general paralytics there will be a period where the patient is decidedly better, and in that period patients have returned to their former occupations, or to other work, but only for a short length of time in the majority of cases. There are some cases that probably go two or three years. There are exceptions reported going four, six, and ten years in one of these periods of remissions which they have. I have only information on three different occasions, the last one in December, 1929. At that time he was decidedly better than he was prior to this time, but from my experience I would expect him to follow the other cases and have a recurrence. I think it was only a remission and temporary.

Cross Examination by Mr. POPE.

I never saw him to my knowledge until August, 1925. These three stages of syphilis, primary, secondary and tertiary syphilis, are stages of the disease itself and may or may not have any connection with the brain or the nervous system. The blood vessel walls are so affected in a large percentage of these cases from the time the person contracts the infection, and may or may not. A person may have syphilis for twenty years and never show any brain involvement; and up to the time you find a brain involvement syphilis constitutes little or no disability. Any other stage of syphilis would not disable a person from carrying on in any substantial occupation. A man may have syphilis involving the heart

(Testimony of Dr. E. A. Nicholson.)

or blood vessels and never have anything the [43] matter with his brain. But outside of conditions like that a man may have syphilis and never know he has it and never be disabled from going on with his work.

Redirect Examination by Mr. FLOOD.

A man may have neuro-syphilis without general paralysis of the insane, or syphilis that might paralyze the eye muscles or the muscles of an arm or leg, and he might not have cerebro-syphilis, and he might have both or any combination.

Mr. L. H. COLLINS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is L. H. Collins. I am a police officer stationed at Georgetown or Precinct No. 3 for the last fifteen years. In my duties at Precinct No. 3 I met Vernon A. Peterson and knew him down there. We were in contact with him a good part of the time since he was in the moving picture business. I cannot fix the time exactly. I suppose 1921, 1922 or 1923. I worked where his show was and once in a while we would go in. Sometimes it was necessary for us to go in and see that the crowd was orderly, and of course we would come in contact with Mr. Peterson, and then he would often come to the police station. Sometimes I was clerk in the station there,

(Testimony of L. H. Collins.)

and he would come in to make reports about various things to us. I saw him personally come into the station and I would walk up to the window and ask him what he wanted, and he would turn away and go away. It seemed he would report that somebody was watching him—imaginary, apparently. I saw nothing about him unless the [44] conduct when he would be in the office there, and his appearance. When I would be in there sometimes I would go to the show when I was off duty, and sometimes I would be on duty and be in there. I remember he was quite busy at times. They would have one night a week when they would have amateurs, and he would seem to be chasing around all over the house for no purpose. His appearance would attract you. Anybody would even notice his actions and his appearance the way he was chasing around. I would say he was nervous and flighty. Sometimes he wasn't very well dressed. He looked as though he needed a shave and maybe a bath—as though he wasn't very clean. I don't think of anything else that I observed regarding the show house.

Cross Examination by Mr. POPE.

I would not be positive. It was 1921 or 1922 or 1923. It might have been 1923. He was not well dressed at times and that was more particularly along the latter part of the time that I knew him. His peculiar actions which I noticed were probably more particularly in 1923 and 1924.

DAN MANZO, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is Dan Manzo, and I am a tailor in business at 6012 12th Ave. South. That is Georgetown. I know Vernon A. Peterson. I first met him in 1919. I knew him from then until almost the time he went to the hospital. That has been a couple of years I think. I observed him and his actions during the time I knew him. In 1919 I [45] fixed a suit of clothes for him, and he always promised he would come in, but I could never get him in the store. I asked him if he would come in and try on the coat and he said "Oh, yes," and he would be all excited, and so finally after I asked him half a dozen times I got him in front of the store and got him in and while he was trying his coat on he was nervous and gritting his teeth, so I asked him if he was nervous or anything, and if he wanted a glass of water, and he said, "Oh, no." That was in May, 1919. He came back after the coat. After that I have seen him many times. He acted about the same. He was always nervous and excited. He stuttered quite a bit. Afterwards, I believe, he was in the show business, and he came in and asked me for an ad on the theater curtains. I told him I would give him an ad, which I did, and he came in and brought me a contract, and I never did see the ad on the curtain. I asked him about it, but could not get any

(Testimony of Dan Manzo.)

answer. He promised he would put it on the curtain, but he never did. In 1919 he always walked funny on the street. Like he was singing or dancing. There was no one with him at that time. In 1919 his conduct was about the same. Whenever I went over and talked to him and said "Hello, Mr. Peterson", and he looked around excitedly and said nothing. Sometimes he would say "Hello". Either of us would do nothing more than say "How are you, Mr. Peterson?" He would turn around and say "How are you?" I made no further observation of him in 1921. I remember when the show started in 1921. It must have been 1921 when Mr. Peterson started the show in Georgetown. I saw him running the show there. I have told you all I know. [46]

Cross Examination by Mr. POPE.

In 1919 was when I made the suit of clothes for him. I am sure it wasn't as late as 1924 when I first noticed anything. This is my signature on Defendant's Exhibit A-3. (Defendant's Exhibit A-3 received in evidence.)

C. F. GRAY, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows on

Direct Examination by Mr. NEWMAN.

My name is C. F. Gray. I am a police officer at present stationed in West Seattle. On June 1, 1920, I

(Testimony of C. F. Gray.)

was transferred to Georgetown. I became acquainted with Vernon A. Peterson when he was in the show business. That was in the fall of 1920. I observed that he was a very nervous and excitable person. I didn't see him do anything that I could think of. I recall that I found his theater unlocked. If I recall, that was in 1921. The doors of the Mission Theater. I found them unlocked only once. I found the back door of the new theater open twice. That was after twelve o'clock at night. I don't remember when the new theater was built.

Cross Examination by Mr. POPE.

I don't recall whether the new theater was built about April, 1924. From the fall of 1920 to the spring of 1924 I only found the doors of the theater unlocked once when I was on the night shift. After the new theater was built in 1924 I found the back door open twice.

Plaintiff Rests. [47]

Mr. POPE.—At this time the government moves for a non-suit on the ground and for the reason that the evidence deduced for and on behalf of the plaintiff does not establish a prima facie case, and is legally insufficient to sustain a verdict;

And on the further ground that there is no proof of permanent and total disability of Vernon A. Peterson during the time this contract was kept in force and effect. I would like to be heard.

The COURT.—I will hear you briefly.

Mr. POPE.—There is positively no evidence that would tend to establish total and permanent disability in the early part of 1919, and in connection with this the plaintiff has introduced reports of the government doctors,—and before that, which show no treatment of any kind while he was in service. Then he came out of service and went right to work. Although the wife has testified, there is really little testimony of any kind of any condition which the man may have been in in 1919. The only thing, she says he had two or three fainting spells, and the man's present condition, as testified to; nothing which in any way shows that he had that condition or that he was totally disabled at that time. Furthermore, on cross examination, affidavits have been put in evidence here in which the wife stated that in 1919 her husband was full of life, neat, active, and intelligent. Now, then, the wife's whole testimony really gives nothing which will in any way controvert that.

In 1923, and 1924, and along in there some nervous symptoms apparently appeared. The man has [48] worked, according to the wife's testimony for a time in California; worked here for the Seattle Municipal Railway for about a year, ten months, I believe, she admitted, but stated it might have been a year. As Your Honor will remember, she testified that he went to work regularly; ate his meals regularly; went to bed about the same time as the family did, and went to work in the regular manner, and during

the ten months or a year, there is not one bit of evidence that he was totally disabled,—only the most general symptoms while he was working for the Municipal Railway, and during that time he was transferred from his position as conductor to head mechanic at the car barns,—and a man who is competent to do his duties regularly as head mechanic at car barns for several months, could not have been totally disabled; and there certainly is no evidence of it. And at the time he quit, he quit not because of physical condition but because he wanted to go in the garage. Apparently he had some trouble making a living, but in any event, he was there a few months. In addition, there are some symptoms shown as to the time he was in the theatre, but the fact remains he was in the theatre from November, 1920, to September, 1924, a period of four years. During these four years, it is admitted that the man, —although his actions may have been peculiar,—was working there; he was going down town getting the films; he was sweeping out the theatre, although the policeman said he was in charge,—this, regardless of his nervousness,—and there is no evidence of total or permanent [49] disability. In Ruston, 1925; they went to California,—and Dr. Nicholson has come along and examined him in 1925. Dr. Nicholson is not in any way contravening the evidence of government doctors. It is true, in 1925; but Dr. Nicholson has not gone back, and has not attempted to show that this man was totally disabled prior to that time, and he has positively testified that syphilis

may exist for years and years and the man may not even know that he had the disability. There is no medical testimony of any kind that this man was either totally disabled in 1919 or permanently so. There were no symptoms in 1919 or 1920, or along in there, in any way connected with this, and the jury would be left wholly to speculation, and as far as total and permanent disability is concerned, there is certainly no proof to go to the jury on that issue, while the policy was in force and effect.

The COURT.—What have you to say?

Mr. FLOOD.—Your Honor has considered this question so often that I hesitate to take up your time.

The COURT.—I wondered why Dr. Nicholson wasn't asked about his condition prior to that time.

Mr. FLOOD.—I considered it, but when I considered it,—the vast scope of the testimony,—I realized that it would be impossible to frame any hypothetical question that would withstand objection. The various complaints having existed continuously since would seem to make out the case of paresis, and without indulging in a question, considering the wide variety of the testimony, I went definitely to the point in the issue. [50]

The COURT.—We have now before the court the testimony that the soldier, the ward, had syphilis when he was discharged and during his service, and Dr. Nicholson testified that it is a progressive disease; that it could be held in abeyance for a long

time; that a person may discharge normal functions for many years.

Mr. FLOOD.—That is true in the abstract case. I think Your Honor must recognize, and there is no question about it, that the Blackburn case never would have been reversed but for one thing; it was only because of the admission of the coroner's report, and the evidence was not to be compared with this. There were a lot of doctors who were not called, but in this case that rule they laid down in the Blackburn case does not apply. We had here definite testimony of conduct, abnormal and eccentric. It is true it can be said that the wife's testimony is contradictory when you consider the affidavits, but they may disbelieve her or believe her as she testified.

The COURT.—But they must have something upon which to predicate the belief. They can't speculate.

Mr. FLOOD.—We have her testimony supported by the testimony of this tailor. True there is a work record. It is the condition while he was at work that counts, and the jury has a right to take into consideration the circumstances that existed along with the work record. There is the testimony of the aunt and the father-in-law.

The COURT.—That does not amount to much. [51]

Mr. FLOOD.—I think it would be a mistake to say that it does not support a reasonable inference,

and that we have a right to ask. We have a right to rely upon the opinion of a doctor, but Your Honor from your experience knows that would have been conjectural, but the jury have heard all the testimony.

The COURT.—This is the strongest thing you have in your favor, that is, Justice Holmes opinion, that the jury is the final arbiter of all questions of fact, and the court ought not to take a matter from the jury, but that is a broad statement.

Mr. FLOOD.—I think there is evidence sufficient to carry the case to the jury.

The COURT.—Now, there is this element in this case. I think, as it stands now, the court should submit it to the jury; and that is the testimony of the wife as to his conduct, and, especially those three fits that she said he had when he worked somewhere, and Dr. Nicholson's testimony that this is a progressive disease; and I think that the court ought to submit it to the jury, with proper instructions, to determine whether the ward was totally and permanently disabled from the date of the discharge and unable to carry on continuously in any gainful occupation within the purview of the law; but the partial disability would not obtain if he became totally and permanently disabled now. He was totally disabled in 1924; that would not answer the question; but I think, in view of some expressions of the Court of Appeals and several members of the Supreme Court with relation to non-suit, the

safer [52] proposition is to submit it to the jury. And the motion will be denied.

Mr. POPE.—That trip to California was after the policy lapsed.

The COURT.—But Dr. Nicholson's testimony is that it is a progressive disease. He described to the court and jury the relations that might obtain and the effect it would have for short periods, and it being a progressive disease, and this condition having developed, I think the court should submit it to the jury.

Mr. POPE.—Exception—

HARRY B. FLANDERS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is Harry B. Flanders, I am employed in the City Comptroller's office, city of Seattle. I am junior accountant. My duties take me all over the office, partly consisting of looking after various warrants in the custody of the city comptroller. I have with me warrants which are paid the employees of the city railway. I have warrants in connection with the employment of Vernon A. Peterson in 1919 and 1920. The employment was apparently continuous. There are twenty three warrants. Two warrants for each month, covering eleven and a half months. Defendant's Exhibit A-4 is made up of

(Testimony of Harry B. Flanders.)

photostatic copies of warrants drawn by the city comptroller on the City Railway Fund, to pay the salary or wages of an employe identified as Vernon A. Peterson. These warrants are dated from July 25, 1919, to June 25, 1920. They are in chronological order. Two for a month. There would be one for July 25, 1919, two for [53] August, and so on down to June, 1920.

(Defendant's Exhibit A-4, being a group of checks, received in evidence)

The COURT.—He has already explained them.

A.—(the witness reading). The first check is July 25, 1919, drawn for $54.98; August 11, 1919, for $62.42; August 26, 1919, for $64.94; September 10, 1919, $27.49; September 25, 1919, for $22.71; the next is for October 10, 1919, for $26.03; the next for October 25, 1919, for $63.98; November 10, 1919, for $58.40. The next for November 25, 1919, for $57.09; December 10, 1919, $57.75; December 24, 1919, $66.94; January 10, 1920, $65.30; January 27, 1920, $67.59; the next is for February 10, 1920, in the amount of $68.91; February 25, 1920, $56.44; March 10, 1920, for $59.72; March 25, 1920, for $68.25; the next is April 10, 1920, for $72.18; April 27, 1920, for $68.25; May 10, 1920, for $68.25; May 25, 1920, $73.50; June 10, 1920, for $64.31; and June 25, 1920, for $15.09.

I have not the number of hours he worked and the rate of pay. Those records are kept in the street railway department. Mr. Thompson has charge of the payrolls.

(Testimony of Harry B. Flanders.)

Cross Examination by Mr. FLOOD.

I did not know Mr. Peterson. I would not know him if I saw him. All I know about him is what my records show. [54]

A. H. GROUT, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is A. H. Grout. I live in Seattle, and I am employed by the city of Seattle in the Civil Service Department. I have charge of the records of the Civil Service Department of the city of Seattle. My records show that V. A. Peterson was first employed beginning July 3, 1919. He then started employment in the same department as machinist's helper, and resigned from that work June 4, 1920. That covers the entire employment. I have his application for employment in 1919. His written application was not made at the time he went to work but a little later—in January, 1921. That was after he quit work—he applied for employment.

The document marked Defendant's Exhibit A-5 is a part of the records of the Civil Service Commission. It is a part of our files referring to Vernon A. Peterson. I have another application for employment. Defendant's Exhibit A-6 for identification is a part of the records of the Civil Service

(Testimony of A. H. Grout.)
Department of the City of Seattle and a part of our files in connection with Vernon A. Peterson.

Mrs. RUTH PETERSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

I don't know whether the signature appearing on Defendant's Exhibit A-5 is the signature of my husband, Vernon A. Peterson. I could not tell his signature from the way it looks there. I have received letters from him quite often. Probably once every two weeks or once a month. [55] I don't know whether this is his signature. It looks more like his signature on Exhibit A-6, but I didn't know that he signed it. I couldn't swear to it. The second document looks more like his signature than the first one. That looks like his signature. I can't swear to it if I don't know exactly.

Mr. HARRY B. FLANDERS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

I was on the stand yesterday. I have additional documents showing that Vernon A. Peterson made earnings not produced here yesterday.

(Testimony of Harry B. Flanders.)

Defendant's Exhibit A-7 is a copy of the additional document. It is a certified copy of an additional warrant which I did not have time to make a photostatic copy of, and therefore had a certified copy made. I have the original warrant. The original of defendant's Exhibit A-7 is the original of the warrant of which I have testified.

(Defendant's Exhibit A-7, a check, received and read in evidence, and copy substituted therefor.)

Defendant's Exhibit A-8 is a true and correct copy of the Seattle Municipal Street Railway payrolls pertaining to Vernon A. Peterson, covering the period from the first half of July, 1919, to June, 1920, inclusive.

I did not know Vernon A. Peterson personally. All I know is that this is a record of Vernon A. Peterson.

Defendant's Exhibit A-8 is a list of the checks issued showing the conditions under which the warrants were issued. There is a column on Defendant's Exhibit A-8 figuring the time in months, days and hours, which are headed M. D. and H. In the hours, there are 103 hours and [56] 30 minutes. That shows the number of hours that were worked during the period named in the period, as first half of July, at the rate of four and a half a day, time for which he worked and for which a warrant was drawn in the amount of $54.98, No. 22887, cancelled July 26, 1919, assigned to the Barto Company.

(Testimony of Harry B. Flanders.)

Cross Examination by Mr. FLOOD.

I prepared the original records. I didn't know Mr. Peterson. These hours are solely from the record as I found them. I have no personal knowledge of them.

Mr. ALBERT POHL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is Albert Pohl. I live at 225 12th Ave. North, Seattle. I am employed by the Seattle Municipal Railway, and I was so employed during the years 1919 and 1920. I was employed at what we generally call the Georgetown shops of the Municipal Street Railway. I knew Vernon A. Peterson in 1919 and 1920. I worked directly with him. I would see him a number of times a day. It might be every hour—it might be twice a day, or even less. The number of men I have under my supervision varies. About a hundred. I might have had more men at that time. Mr. Peterson was first hired as a machinist's helper. He did that work. It is hard to say how long. I put him at overhauling automobiles shortly after that. He repaired automobiles up until June, the first part of June. I have his employment card here.

Defendant's Exhibit A-9 is the employment record of [59] Vernon A. Peterson. It was made by the

(Testimony of Albert Pohl.)

bookkeeper. I know the writing. I know the bookkeeper's handwriting. I have the time books showing Mr. Peterson's work in 1919 and 1920. The bookkeeper kept these records at the time.

(Defendant's Exhibit A-9, being application for employment, received and read in evidence.)

Defendant's Exhibit A-10 was made by the bookkeeper at the shops. I know the bookkeeper's handwriting. That is in the handwriting of the bookkeeper. There are two bookkeepers. I know the handwriting of both of them. One is called Mr. Crank. He is not there now. I believe he is still living in Enumclaw.

(Defendant's Exhibit A-10, being time books, received in evidence.)

The COURT.—(Looks at books). These will be admitted insofar as they relate to Vernon A. Peterson. I had a copy made this morning out of these books. This was taken from those books and shows the time that he worked there during the time he was employed under my supervision. I had them copied this morning. Vernon A. Peterson's work was satisfactory. I didn't see anything wrong with him or about him all of the time he was employed there.

Cross Examination by Mr. FLOOD.

There might have been more than a hundred men employed under my supervision. That is approximately the number. I do not remember all of the names of the men who worked under me in 1919. I

(Testimony of Albert Pohl.)

don't remember how long they worked for me. All I remember is from the records. [58]

Redirect Examination by Mr. POPE.

I remember the man. He worked directly under my supervision. He didn't work under any foreman particularly. He did the repairing of automobiles, and I generally looked after the automobiles myself at that time because we didn't have very many.

W. L. COCHRAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is W. L. Cochran, and I live at 813 31st Ave., Seattle. I am employed by the Municipal Street Railway and was so employed in 1919 and 1920. I knew Vernon A. Peterson in 1919 and 1920 at the Georgetown Shops where I was employed during that time in 1919 and 1920. Mr. Peterson was working on automobiles on one corner of the armature room. I was working there in the armature room. In the same room with Vernon A. Peterson. I was there eight hours a day. He was there about three weeks one time I know of, and he worked in the machine shop a part of the time and a part of the time in the armature room. In the armature room several days. Back in the machine shop for a few days, and then in the armature room.

(Testimony of W. L. Cochran.)

That extended during the time he was out there and until he quit. He always seemed to be thrifty. He always seemed to be busy. I did not see anything about his mental or physical condition which in any way impressed me. I didn't see anything wrong with him at all. [59]

Cross Examination by Mr. FLOOD.

I worked continuously in the armature room. He worked about three weeks with me there. Most of those three weeks he was in there. He was in there a few days and then a few days in the machine shop.

Redirect Examination by Mr. POPE.

It was off and on, but I remember one job in particular it was three weeks steady, but it was off and on during the time he was there.

C. F. MARTIN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is C. F. Martin. I reside at Sol Duc Hot Springs. I resided in Seattle in 1923 and 1924, at 503 North 42nd. I was a general contractor at that time. I became acquainted with Vernon A. Peterson prior to November, 1923. I became acquainted with him over the building of a theater in Georgetown, Duwamish Avenue. Negotiations started about November, 1923. These negotiations

(Testimony of C. F. Martin.)

were had with Mr. Vernon A. Peterson. With no one else until the papers were signed. I did not have occasion during these negotiations to visit the old theater. I had a general foreman on construction and met Mr. Peterson probably once or twice a week. I saw him probably a dozen times before we got the papers ready. I did not notice anything about his physical or mental condition which impressed me in any way. I purchased the property and built the building and sold it to him, giving him credit on the old equipment and furniture on the old theater. I built the building for Peterson. I entered into the contract with him for the sale [60] of the building before it was built. The purchase price for the building was forty four thousand dollars, but a little equipment was added on the total price and credit given, bringing it down to thirty nine thousand dollars. It was to be paid four hundred dollars a month. The building was a brick and concrete frame building. I believe there was a ten per cent margin on the building at that time. I don't know the net cost.

Cross Examination by Mr. FLOOD.

I am reading from the contract. That is my copy of the contract. I believe we started building April, 1924. That was the first contact I had with Mr. Peterson. It took several months to get the negotiations straightened out. The negotiations were in my office in the Seaboard Building, Seattle. He would come in several times to talk about the

(Testimony of C. F. Martin.)

theater. As near as I remember, he came in alone. There might have been someone else—theater equipment men, possibly. I gave credit of about $5,000 on the fixtures. I don't believe there was a cash payment. The building was built on a loan from the Pacific Loan of Tacoma. I made the loan myself. Either I or someone working for me drew the plans and specifications. The plans were agreed upon to Mr. Peterson's satisfaction. I submitted the plans and they went through. I took the theater back five or six months later. He made the payments direct to the bank. I would not say that he made a payment. I took it away from him because he didn't make the payments. I have been a general contractor twenty five years. I am running the Sol Duc Hot Springs and contracting. My folks are living in Seattle. I am not living here right now. [61]

ALBERT POHL, recalled as a witness on behalf of the defendant, testified as follows on

Direct Examination by Mr. POPE.

I have compared defendant's Exhibit No. 11 with the time books which are marked defendant's Exhibit A-10. Defendant's exhibit A-11 correctly states all the evidence in the books as to Mr. Peterson's work record.

(Defendant's Exhibit No. A-11 received and read in evidence)

(Testimony of Nora L. Held—E. L. Newman.)

NORA L. HELD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is Nora L. Held. I am employed by A. V. Love Dry Goods Company as accountant and pay roll clerk. I have records showing employment of Vernon A. Peterson—the payroll book. That was from September 12, 1928, to October 24, 1928. The designation of his employment was to look after the sawdust burner. He was paid on the 15th. I made a copy from the records myself and I compared it.

(Defendant's Exhibit A-12 received and read in evidence)

E. L. NEWMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is E. L. Newman. I reside at 1914 6th Ave. West. I am employed by A. V. Love Dry Goods Company. I was so employed in 1928. I knew Vernon A. Peterson in 1928. He was working down in the boiler room and I was working upstairs. I happened to go down once or twice a day to see [62] him. He was fireman down there. That was in 1928. He performed his duties all right. I think it was in September and October, 1928.

(Testimony of Harriet Anderson—K. R. Terry.)

HARRIET ANDERSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is Harriet Anderson. I am employed by the Seattle Office Equipment Company as bookkeeper. I have the records of the company in my custody. I have the records of employment of Vernon A. Peterson by the Seattle Office Equipment Company in 1929 and 1930. He was employed from April 5, 1929, to January 5, 1930, at the rate of twenty two fifty a week. He was there regularly during that time.

K. R. TERRY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is K. R. Terry. I reside at Seattle and I am employed by the Seattle Office Equipment Co. I was so employed in 1929 and 1930. Vernon A. Peterson was an employe of mine at that time. I observed him there at that time. He was doing janitor work in the store. The store has three floors.

(Testimony of C. R. Christie.)
He did ordinary janitor work. His work was fairly satisfactory.

Cross Examination by Mr. FLOOD.

He wasn't the best janitor we ever had. He left voluntarily. He was there every day—eight hours. [63]

C. R. CHRISTIE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is C. R. Christie, and I am employed by the United States Veterans Bureau. I am contact representative. I have had considerable experience in comparing signatures of veterans in making loans with the government, for the past four years.

DONALD BECKMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is Donald Beckman. I reside at 6507 32nd Northwest. I am employed by the Western Poster Company. I previously became acquainted with Vernon A. Peterson during the time he oper-

(Testimony of Donald Beckman.)

ated his theater—the Mission Theater in Georgetown. That acquaintance covered a period of years. I knew him during the time that he operated the theater, I believe. I would see him various times during the week. Our business is theatrical advertising, and he would come into our store for what advertising he needed for his theater. It would be several times a week, or sometimes only once a week. I do not remember that anyone else came with him. I did not notice anything wrong with Mr. Peterson during that time. He acted just like any other customer that we had.

Cross Examination by Mr. Newman.

I saw Mr. Peterson from day to day. I saw him when he came in. My contact with Mr. Peterson was very slight and he was a steady customer and I had no contact with him [64] except seeing him there come in as a customer in the store. The city clerk passed articles to him. Our office is a general meeting place and they all meet to discuss various things. I can only remember one conversation and that was after he lost his employment.

C. R. CHRISTIE, recalled as a witness for the defendant, testified as follows on

Direct Examination by Mr. POPE.

The signatures on the checks were written by the same person that signed the name "Vernon A.

(Testimony of C. R. Christie.)

Peterson'' on Defendant's Exhibit A-5. The signature on the checks is the same as that on Defendant's Exhibit A-6.

Cross Examination by Mr. FLOOD.

I have never had any employment as a handwriting expert before. I have been with the Veterans Bureau since 1921. The first time that I saw the signature was in the court room. I used nothing but my naked eye to examine them.

(Defendant's Exhibit A-5 and Exhibit A-6 received in evidence and read to the jury)

Dr. L. R. QUILLIAM, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is L. R. Quilliam. I am a physician specializing in nervous and mental diseases. I graduated from the University of McGill, and took my medical education at Ann Arbor, Michigan. [65]

The COURT.—Qualifications admitted.

Mr. FLOOD.—Yes, Your Honor.

I am employed by the United States Veterans Bureau at Seattle.

The disease known as syphilis usually develops in three stages. The first is the stage of infection, which is marked by a sore on the penis which is

(Testimony of Dr. L. R. Quilliam.)
known as a chancre. I might qualify that by saying that that develops wherever the infection takes place, and it appears usually from four to five weeks after the infection takes place. The sore develops into a hard sore, and that is known as a chancre, and is known as a hard chancre in contrast with a sore condition known as soft chancre. The hard chancre is always a mark of syphilis; that manifests itself from four to six weeks after infection takes place; that is, the exposure to infection has taken place. We don't always find a chancre in that case; that is, on the external surface of the body. There might be an infection through the mouth or inside the mouth due to kissing somebody that has the disease, or may be infected by syphiletic mucous patches of the throat at that time diseased due to other infections, and usually a chancre appears from that. And then there is apparently a resting stage for a few weeks or months, usually less than a year, more often from six weeks to two months and there are manifestations on the body of the infection in the form of rashes or of sore throat or ulcers. That is known as the second stage. Then later on in life, if the third develops and this individual has not had treatment which arrested the disease or possibly cured it, we have the last manifestations of syphilis known as the tertiary stage of the disease, and that manifests itself by striking the nervous system, and in certain cases, [66] depending upon the form that the disease takes, it

(Testimony of Dr. L. R. Quilliam.)

either affects the spinal cord, the coverings of the brain, or else the brain itself, and if it affects the brain itself, it usually results in a form of insanity. That does not always follow syphilis at the stage where it reaches the central nervous system. Intensive and prolonged treatment and careful watching make it possible for a man to be cured, or it is possible for the disease to become arrested or to become so attenuated and lessen its effect that the third stage may not come, or possibly it will be very late in life. Before the disease reaches the central nervous system, many individuals go on without knowing they have the disease at all. Of course, treatment in the first place in the early stage of the disease may effect a cure. Then there is the fact that a man may have inherited syphilis, and a man may have an infection and be entirely innocent of any knowledge of having acquired the disease. If in the first stage of the disease a man has developed a chancre, there is a certain amount of inconvenience, and sometimes it leaves a scar, and sometimes it does not. In the second stage of the disease he may be incapacitated to a certain extent by reason of some sore throat or ulcers on the body, but he is not bedridden or prevented from doing ordinary work.

That is my signature on plaintiff's Exhibit No. 3, dated September 3, 1925. I remember Vernon A. Peterson and remember that that is my signature and evidently it is an examination I made at that

(Testimony of Dr. L. R. Quilliam.)
time. I have no recollection of that examination of him in 1925. After examining the man and after the report of the other examinations at that time, the complaint that he made and my own examination of the man, I concluded that it was syphilis of the nervous system,—an early case of syphilis of the nervous system. I don't [67] know how long before I examined him he had syphilis of the nervous system. I could not say how long he had had that condition in which I found him. I would say that I thought it was an early case of syphilis of the nervous system, and I don't know how long those symptoms were there. It was probably I would say an early stage of the tertiary stage of syphilis; that is, syphilis of the nervous system, which is the third stage of the disease—perhaps the early part. I can't tell you when the line crossed from second to the third stage. It is a progressive disease unless a man has had a lot of treatment, and the stage between the second and third is marked. The time it would take to progress is indefinite. In some cases the third stage of syphilis follows the second stage very soon. In other cases there is a very long delay depending upon the man's natural resistance to the disease. The personal element enters very much. Some men who acquire this infection become invalids very soon. In other cases they seem to have a natural resistance or partial immunity to the disease, and the third stage is held off for a great many years. During that time they may be unaware that

(Testimony of Dr. L. R. Quilliam.)

they have syphilis of the nervous system, or that they are affected with the disease.

The man's complaint was weakness and inability to do hard work. The condition was not a permanent one because I recommended at that time that the man be sent to the hospital for treatment, figuring that the man might be benefitted very greatly by treatment in the hospital. In my opinion he was not totally disabled at that time. [68]

Cross Examination by Mr. FLOOD.

I do not recall examining him since that time. I believe I have examined him only once. I recommended that he be sent to the Cushman Hospital at that time. I think he is sitting out there (pointing). I don't remember him.

Neuro-syphilis is the general name for syphilis of the nervous system. Neuro-syphilis would include syphilis of the nervous system, rather than where there are no manifestations of mental disease at all. Both neuro-syphilis and general paralysis of the insane are manifestations of the tertiary stage. If you find mental manifestations, an impairment of the mental faculties,—cerebro-spinal syphilis is another term for general paralysis of the insane—another form of it. Usually all cerebro-syphilis,—if syphilis has invaded the cortex of the brain there are usually mental symptoms as distinguished from purely symptoms of the nervous system. Neuro-syphilis; usually by that we mean that the infection

(Testimony of Dr. L. R. Quilliam.)
has invaded the covering of the brain and the covering of the spinal cord without involving the brain substance itself. I consider impairment of the mental processes as suggesting cerebro-syphilis. Also an impairment of the memory. "Orientation" is the ability to know where he is, what time it is, what day of the month it is; in other words, to be oriented is to know where he is. There are findings here suggesting involvement of the nervous system, that is, of the cortex of the brain as well as of the spinal cord. That would include a pretty general infection of the nervous system. I do not know whether or not I examined him later. Paresis, cerebral type, is the same thing as general paralysis of the insane. You usually find in certain stages of paresis that they show losses of memory. [69]

I have refreshed my recollection about the examination of January 13, 1930. At that time my diagnosis was paresis, cerebral type. It is the same as general paralysis of the insane. Cerebro-spinal syphilis has not advanced to the stage of paresis. "Euphoria" means a feeling of well being. That is symptomatic of paresis. "Prognosis" means outlook —whether he will get better or worse. "Prognosis unfavorable" means that the outlook is unfavorable as to the outcome of the disease. "Prognosis guarded" means that the outcome of the disease is uncertain depending largely upon the treatment and how the disease reacts to the treatment. "Prognosis guarded" simply means that if the man continues

(Testimony of Dr. L. R. Quilliam.)

treatment the chances are that he will be better, but if he is unable to get better because of defects or other reasons, or if he does not react well to treatment, he may get worse, and therefore the outlook is guarded. I think I found in my examination of 1925 that the outlook was guarded. If he didn't improve under treatment I would say that the outlook was unfavorable. I think the outlook is still guarded. Prognosis is guarded. Generally speaking, on a full-grown case of paresis, our prognosis is always unfavorable, but with the present treatment we find some of these cases undergo remarkable remissions, and that a man becomes apparently well; that since the advent of the malaria treatment and the arsenic treatment some of them undergo remarkable change, and some of them, so far as we can determine, are practically well. I recommended that he go to the hospital at Walla Walla or Portland. As a rule cerebro-spinal syphilis precedes paresis. Sometimes they co-exist. Neuro-syphilis is a disease that covers the whole thing. Cerebro-spinal syphilis means that the base of the brain, the cerebrum and the spinal cord are also affected, but [70] when we make out laboratory reports we find out on examination of the spinal fluid that it gives a distinct curve to certain types, in certain stages of the disease, and cerebro-spinal syphilis, a curve of entirely different type,—that is the reason why we usually classify the case. In the examination of 1925 I didn't take the spinal fluid. I presume I recom-

(Testimony of Dr. L. R. Quilliam.)
mended that the spinal fluid be taken. I didn't have a colloidal gold test made. A colloidal gold test is a corroborative test made from the spinal fluid.

Redirect Examination by Mr. POPE.

When I examined him in 1925 I found there was an irregularity of the pupils, but no other change. They reacted to light, and the reflexes were present. In 1930 I think there was still inequality in the reaction of the pupils of the eyes. The pupil is the round black spot in the center of the eye. It is merely a hole, the aperture through which the light enters, and enlarges or becomes smaller, depending upon the amount of light that can be admitted. They contract at light or get smaller when the light is bright, and get large or enlarge at night to admit more light. We find in syphilis of the nervous system, usually in cases of paresis, not always but usually, that they do not react; that that power to react to light, that is, of getting smaller is lost; in other words, the pupils get fixed. They are constant and always about the same in most cases. Sometimes larger than normal; but the light reflexes are lost. That is one of the most valuable signs we have of that stage of the disease; and when I examined him in 1925, there was some irregularity on the size of the pupils, that is, the opening on one side was larger than it was on the other; but the reaction to light was still [71] present. A comparison of the condition in 1925 with the condition in 1930 showed

(Testimony of Dr. L. R. Quilliam.)
an advanced condition. I mean that the eyes were more affected in 1930 than in 1925. The man gave a history of being regularly employed. I don't know definitely when this man contracted syphilis. From the change,—I examined him in 1925. My diagnosis at the time was that he had neuro-syphilis in the early stages, and from the fact that the light reflex was still in his pupils, and the fact that he had practically no change in his deep reflexes,—that is a very important sign,—the deep reflexes,—by tapping the tendon below the knee you get a marked jump of the leg. Usually, in advanced cases those are increased. In 1925 they were not increased; There was some increase in 1930; there was a Rhomberg at that time,—that is, standing with his feet together and his eyes closed, the individual sways,—the findings that we expect to find in the later stages of the disease; these were not present on the first examination. For that reason, I believed that was an early stage of syphilis of the nervous system. It was my opinion that the symptoms of the nervous system had not been present for more than two years prior to that. That is merely my opinion, because I didn't examine him until 1925, but I would expect to find it more pronounced if the conditions had existed over five or six or seven years. I don't believe he would have had the nervous symptoms as early as the year 1919. That would be six years prior to the first time I examined him.

(Testimony of Dr. L. R. Quilliam.)

Recross Examination by Mr. FLOOD.

I found increased reflexes in 1930. That is on the report (reads from report) "Deep reflexes are equal and about two plus; co-ordination normal." That means that the [72] reflexes are equal on each side, but both of them are exaggerated to two plus on a scale of four. This increase was about half of what we would scale as four plus. They were increased that much. All I know about the examination was what I put on the paper. By "deep reflexes patellar and Achilles active and equal" I mean normal. They were active and equal on that examination. Sometimes you will have an inequality, the reflex being more marked on one side than on the other; one may be normal and the other decreased, or one may be normal and the other increased, or you may have them normal and equal, or increased and equal, or decreased and equal. But when they are active and equal that means they are normal. They would have to be active to be normal. If they had been decreased, they would not be active. If they are just a little increased that would be one plus. One plus indicates nothing especially, just slightly hyper-active; two plus would be more active; four plus would be extremely active. Two plus is about half extremely active. The difference I found in 1930 and 1925 was the difference in reflexes and a difference in pupils. The pupils reacted very slightly to light. In 1930 the pupils were still unequal in size, but they reacted only slightly to

(Testimony of Dr. L. R. Quilliam.)
light, which is different entirely. Slurring of speech means inability to pronounce certain words distinctly, and I found that in 1925. That is a disturbance at the base of the brain. It is really the nerve that controls the muscles of speech, and, especially, the nerve that controls the muscles of the tongue. That is an involvement of cerebro-spinal syphilis. In 1930 I found some improvement in the scanning of speech. [73]

MARGARET MAHAN, called as a witness on behalf of the defendant, having been first duly sworn, testifed as follows on

Direct Examination by Mr. POPE.

My name is Margaret Mahan. I reside in Seattle, and resided at the same place in the years of 1920, 1921 and 1922. I was formerly employed at the Mission Theater in Georgetown. I was employed some time in 1920 or 1921. I must have been there for six months or a year. I was employed there by Mr. Woodhouse, and later on it was Mr. Peterson. Mr. Peterson was there when I first went there. He must have been there two or three months after I came. Mr. Peterson managed the theater. He was there in the evenings to see that the place was running all right. During the day he arranged the films and fixed things and things like that. I was an usher and later on cashier. No one except Mr. Peterson managed the place after Mr. Woodhouse left the

(Testimony of Margaret Mahan.)
theater. A little later there was a Mr. Lilly, but I don't think he took an active part. Mr. Lilly wasn't there very much. Sometimes he came out every night during the week. Well, he was there in the back when I came up, and checked up the cash. Mr. Peterson arranged handbills and different things to do with the business of the show.

Cross Examination by Mr. FLOOD.

I am twenty six years of age. I do not remember whether I was employed in 1921 or 1920. Mr. Lilly was about the place. He was a partner. Mr. Peterson put up the posters and swept out and did general things like that. General janitor work. I was there three or four months after Mr. Peterson was. I think it was longer. I left because we had a disagreement. [74]

Redirect Examination by Mr. POPE.

The fact that I had a disagreement with Mr. Peterson at the time I left there would not affect my testimony now.

Mr. OSCAR SWANSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows on

Direct Examination by Mr. POPE.

My name is Oscar Swanson. My business place is 5622 Corson Avenue. I knew Vernon A. Peterson. I used to be doing business with him. I used to lease

(Testimony of Oscar Swanson.)

the shop from him. That was about 1920, up to 1924. That shop was joining the Mission Theater. I rented the shop from Mr. Peterson. He had a ground lease. The property was owned by the same party. He had the lease on the Mission Theater and the shop, so I leased it from him and paid him fifteen dollars a month. I observed Mr. Peterson in connection with his work around the theater. I saw him almost every day. He had charge of the theater. He was manager of the theater. He and Woodhouse formed a partnership when I first went in there. To the best of my recollection Mr. Woodhouse left in 1919, or maybe 1920. A man by the name of Mr. Lilly had some money invested in it after that to the best of my recollection. He was around there frequently. He used to come around. He was kind of looking after things. Mr. Peterson was managing the place. It appeared to me that he was normal from 1920 up to August or September, 1924. He used to come in the shop quite often. I used to see him occasionally there. [75]

Mr. POPE.—At this time the government moves for a directed verdict on the same grounds and for the same reasons interposed in connection with the government's motion for a non-suit at the close of the plaintiff's case.

The COURT.—I will submit the matter to the jury.

Mr. POPE.—I would like to say this, Your Honor, assuming everything that was said to be

true, I can't see any evidence of total and permanent disability when he was discharged from the army at the time the contract was in force and effect.

The COURT.—I will submit the matter.

Mr. POPE.—May we have an exception to Your Honor's ruling?

The COURT.—Proceed with the argument.

(Argument by Mr. NEWMAN, Mr. POPE and Mr. FLOOD)

The COURT.—Let the record show all the jurors present.

The issue in this case, gentlemen of the jury, is upon a policy of war risk insurance issued by the government, the defendant in this case, to Vernon A. Peterson while he was in the service of the army of the United States during the world war. He entered the service on the 30th day of November, 1917, and was discharged on January 9, 1919.

The COURT.—When did you say it was? [76]

Mr. POPE.—January 25, 1919.

The COURT.—It is admitted, or there is no proof to the contrary, that the premiums on this policy were paid to the date of his discharge, and, I believe, to midnight of the 31st day of January, 1919, and was in force and effect to midnight of the 28th day of February, 1919. The issue is the physical and/or mental condition of Vernon A. Peterson on

or before the 28th day of February, 1919.

We are dealing here with a written contract between the government and Vernon A. Peterson. We have nothing to do with the general laws with relation to relief of soldiers, popularly known as the "Pension Act," except insofar as applications which could have been made for pension under the general law may bear upon the facts with relation to his physical and/or mental condition. The insured, or Peterson, is no doubt receiving some consideration under the pension law. I don't know whether he comes under the Pension Act, but we must dismiss that from our minds. I mention that because there is in evidence an application made under the general law for pension which has a statement as to his health. But we are not concerned with anything but the man's physical or mental condition at the date of his discharge.

The burden of proof is upon the plaintiff to show that Peterson was totally disabled on the date of his discharge, and also that this total disability was permanent and reasonably certain to continue throughout his life. These things must be established by a fair preponderance of the evidence, and if it is not shown by a fair preponderance of evidence that he was totally disabled with a reasonable certainty to be permanent throughout his life, at midnight on the 28th day of February, 1919, then no recovery can be had. [77]

These things, total and permanent disability must be considered together. In determining the issue as to total and permanent disability and reasonable

certainty as to being permanent throughout his life, you should take into consideration all of the evidence presented during this trial; take into consideration every element and circumstance disclosed by the testimony in concluding as to the truth of this case. The court,—and you are a part of the court,—is here to discharge a fixed function and duty imposed by law, because of the disagreement between the plaintiff in this case and the defendant as to the total and permanent disability, and we can only determine that from the evidence which has been presented.

Now, in argument, something was said that the court denied the motion for a non-suit in this case, or dismissal. The fact that I denied a motion for non-suit, or motion to dismiss because of the record in this case is no evidence before you that the plaintiff has sustained the burden. The constitution of the United States fixed the right of a person to have a jury trial upon any amount in controversy in excess of Twenty Dollars, and it has been a mooted question before the Supreme Court whether the court has a right to dismiss any case, and no court, unless there is absolutely no evidence upon which a verdict can be sustained, or upon which to predicate any sort of a finding. The fact that there may be some evidence does not indicate that the burden has been established, controverting all the evidence presented, and that a conclusion would be arrived at upon the merits of the case upon a controverted issue,—so you will disregard the fact that I declined

to dismiss the case and not consider that in your determination, but conclude upon the evidence presented here, and the law, as to what the [78] facts are, and whether the greater weight of the evidence shows that the plaintiff—soldier—was totally and permanently disabled at the date of his discharge.

Total disability is deemed permanent when it results from a fixed condition of mind and/or body which renders it reasonably certain that the insured will continue to be totally disabled throughout his lifetime,—that the total disability existed at the date of his discharge in this case,—on the 28th day of February, 1919, and was at that time likely to be permanent and reasonably certain to continue throughout life.

Total disability is a relative term. It is not confined to the insured's employment or strength or facility to pursue continuously his usual vocation; a man might be disqualified,—unable to pursue his usual vocation; for instance, a man might be a telegraph operator, and if he lost his fingers he could not operate the keys, or if he lost his hand, that would disqualify him as acting as a telegraph operator, but he would not be totally disabled from following some vocation or occupation. It is not a condition which prevents him from doing anything whatsoever pertaining to his occupation, but only to the extent that he could not do any and every kind of activity pertaining to any gainful occupation.

The measure of total disability is not whether the insured's injuries would render it impossible for

him to do anything within the requirements. The term "continuously" is significant. Ability to work and apply one's self spasmodically or intermittently for short periods of time does not meet the requirement, the intendment of the law being that the injured person shall be able to adapt himself to some occupation or pursuit or employment, every [79] part of which employment he can discharge, that will bring him substantial, gainful results, something that will be dependable for earning a livelihood. The amount of gain is not so material, except that the pursuit of the endeavor must be one tantamount to substantial, gainful results.

Total disability, to be permanent, must be such as is founded upon conditions which render it reasonably certain that it will continue throughout his lifetime, and it is essential that the mental and physical condition of the person so disabled be so considered, and when so considered, the inquiry is whether the conditions are such from which the conclusion may be deduced that it is reasonably certain to continue throughout his life.

Reasonable certainty is not a matter of surmise or speculation. It is such a certainty as a reasonably prudent, scientific, careful and experienced person would conclude would probably be the result of conditions ascertained and present as a basis for deduction.

Permanent and total disability, within the meaning of this law and policy, does not necessarily mean that the —— must be bedfast or bedridden; an attempt to work, inability to work being present, does

not necessarily negative a condition of total and permanent disability, but the essence of the total and permanent disability involves this question, which you must answer as a question of fact: Was Peterson at all times, at the date of his discharge, and all times since that date, suffered from an impairment of mind and/or body which has prevented him from continuously following a substantially gainful occupation, and has it been since said date reasonably certain that this condition would continue throughout life. And in this consideration, the insured is entitled, not only to the most favorable [80] aspect of the evidence which it reasonably bears, but also entitled to such reasonable inferences as arise from facts which have been proven; not on surmise or speculation, but facts which have been established.

During the course of this trial, and on argument, much was said with relation to the insured's present condition, or about his condition, and emphasis placed especially upon his condition since 1925. Now, the fact that the insured has been confined in a hospital for several years, as disclosed by the evidence, of itself, is not evidence of total and permanent disability at the date of his discharge. The fact that the doctors' examinations in 1925 and since that date have disclosed a condition, a nervous condition which has rendered him for the time totally impaired,—and Dr. Nicholson stated that from his examination in 1925 and 1926, I think it was, he thought the condition was permanent; However, you

heard what he said. He said there might be periods after he had reached that nervous stage, where the person would have periods of remission of the activity of the disease, but that the condition would continue, he thought; that the periods of remission depended greatly upon the individual; that sometimes persons having the affliction with which the insured is suffering, and do not know that they have it, possibly for a long time; sometimes persons have the disease and do not know for a long period of time. You will have to taken the evidence as he gave it, and, likewise, Dr. Quilliam for the defense.

The fact that this condition was found in 1925, of itself, does not show that the condition existed when he was discharged. Then, in order to find out what the condition was when he was discharged, you will have to take the evidence that is presented; what did the insured do in the [81] meantime; what activities was he engaged in; what medical advice did he demand, or did he go to a doctor; did he consult any doctors during all this time; did he make any claim of total and permanent disability when he made claim for allowance under the general law; that was, I believe, in 1925. What did the doctor say he found as to his condition; what did he say as to the date of its inception; what was his complaint as to his physical or mental condition? What did the wife say in the affidavits filed as to his physical and mental condition? When did this disability assert itself upon which the application for pension was made? Then, what did the insured do after he

left the army? Was he active? Was he employed? Where was he employed? Was it a position of responsibility Did he continue in that employment regularly? What were his habits of life with relation to home and family? When did he eat? When did he go to bed? Did he act like a normal person? What do his employers say with relation to his conduct in doing the work for which he was employed? What was his relation to the employees? What was his conduct when he was in business for himself from 1920 to 1924 in the theater business? What does the contractor say? Who negotiated the lease or the contract for the theater involving forty four thousand dollars? What did he say about? How did he act? Did he act as a totally and permanently disabled person? Or, when did this total and permanent disability condition assert itself, and what was the cause?

If he had an ailment at the time of his discharge and that did not assert itself into a permanent or fixed condition until 1925, then he was not totally and permanently disabled when he was discharged, and as to the time when the total and permanent disability asserted itself, [82] I think you have a right to take into consideration the testimony of the nerve specialist who was called upon the stand by the plaintiff, and what he testified to, in considering whether he was totally and permanently disabled at the date of his discharge. I asked him how long it would probably continue, and he said from what he had learned from the case,—you heard what he

said,—and that it would likely continue in the future. I didn't ask as to the preceding period. The plaintiff did not ask him how long that antedated the 1925 examination, that total and permanent disability condition,—and you have a right to assume, when a witness is available or upon the witness stand, who is qualified by reason of expert knowledge or special training on a particular thing, or his knowledge with relation to the unfolding of the issue that is before the court, and the party who should ask him those questions does not do so,—then the court can assume that the answer to the question, if asked, would be against the party who should have developed the fact. What we want here is to have the truth established insofar as it may be done, and if the burden has been sustained by the plaintiff, then the plaintiff is entitled to recover; but we have no right, either you, as jurors, nor I, as judge, to attempt to pass largesse from the Treasury to any person making a demand.

There is another thing that you should take into consideration in this case, as well as other things, and that is, when was the action filed for total and permanent disability? Claim was filed under the pension law in 1925. Nothing was said about total and permanent disability. Claim was filed more than four years before this action was commenced. This action was commenced in this case on the 29th day of May, 1929,—ten years and practically four [83] months after the date of his discharge,—when it was asserted that he was totally and per-

manently disabled at the date of discharge. These are only circumstances that are developed in this case and are present, and conditions which we should take into consideration and dispose of as conscientious men in the discharge of sworn duty as officers of this court.

If I have referred to any fact in this case, it has not been to intimate to you any belief that I may have of the fact. I have no opinion. I am simply here to instruct you upon the law, and if I have referred to any fact or circumstance in the case that bears relation to the issue here, it has been simply for the purpose of challenging the attention of you jurors to these particular things for your consideration, and you will disregard any thought that you feel I have expressed as to the facts in this case, and find these facts for yourselves as developed from the witness' stand and the exhibits which have been presented in this case, to the end that the issues may be determined by twelve fairminded men who have been empanelled in this case for the purpose of finding what the fact is. From your finding upon the facts in this case there is no appeal. I merely suggest that to you to impress upon you the burden that rests upon you, and you must find what they are.

Now, the burden of proof, or preponderance of the evidence does not mean the greatest number of witnesses testifying to any fact or state of facts. It is the testimony which carries the convincing appearance of truth. It may be one exhibit or one

witness upon the witness stand that will have the greatest weight in determining what the truth is in this case; and you will take into consideration, [84] therefore, all the testimony presented here.

While you are the sole judges of the testimony here, *you also* the sole judges of the credibility of the witnesses, and in determining the weight or the credit you desire to attach to the testimony of a witness you will take into consideration the reasonableness of the story, the interest or lack of interest in the result of this trial, the opportunity of the witness for knowing the things about which he has testified, and from all this determine where you believe the weight of the evidence is. Give this issue fair consideration, so that the plaintiff will know that it has been shown fair consideration, and, likewise, give the government a square deal so that it will appreciate that fair consideration has been given to this issue.

It will require your entire number to agree upon a verdict, and when you have agreed you will cause it to be signed by your foreman whom you will elect immediately upon retiring to the jury room.

Two forms of verdict will be submitted; one will be "for the defendant;" and if you find for the plaintiff, you will find that he was totally and permanently disabled from midnight on the 28th day of February, 1919.

Have I covered the case? Are there any exceptions?

Mr. FLOOD.—There are two subjects upon which I would like an exception. Your Honor commented that where a witness was called by a party and was not asked a question on something that might have been asked, it would warrant the inference of an unfavorable answer. I think, Your Honor, that is not the law, and I know of no legal warrant for that. I would like an exception. [85]

The COURT.—So that the jury may not misunderstand the instruction, I will repeat it. You evidently misunderstood it.

Mr. FLOOD.—I hope I did.

The COURT.—Where a witness is upon the witness stand testifying to a particular issue; for instance, total and permanent disability; and he has testified to total and permanent disability, we will say, in 1925, and the issue is total and permanent disability in 1919, and if the witness is a doctor and he has examined the patient and knows about the conditions in the case and could enlighten the court and the jury and he is not asked the question, then the court has a right to assume that the answer would be unfavorable.

Mr. FLOOD.—I would like an exception. He was here for cross examination and might have been asked by the court or the counsel for the other side.

The COURT.—I think I conducted a good deal of this case as it was. I will frankly say that I think you supplied that in some other way.

Mr. FLOOD.—Counsel is astute and could handle his own case.

The COURT.—That is what he would avoid.

Mr. FLOOD.—The next consideration that we except to in Your Honor's instructions, is that Your Honor commented upon the fact that this action was filed ten years or more after discharge. I think Your Honor permitted an unfavorable inference to be drawn. [86]

The COURT.—Perhaps I did. He could bring that action any time that he wanted to within the period of limitation, which he did. You could take that into consideration as a circumstance as to whether the man was totally and permanently disabled in 1919, and whether he would wait ten years and four months before filing an action; that *that* fact, of itself, does not show that he was or was not totally and permanently disabled, but is merely a circumstance to be taken into consideration with all of the other testimony in the case as to whether that total and permanent disability existed on the 28th day of February, 1919.

Mr. FLOOD.—I think that improves it. However, may I ask for an exception because there is a guardianship in this case?

The COURT.—There is a guardianship established but that applies to the guardian as well.

Mr. FLOOD.—May I submit another consideration, Your Honor?

The COURT.—The guardian was appointed on the 12th day of November, 1926, and the guardian

acted for the insured after that time. That is not final, and is merely an element.

Mr. FLOOD.—Your Honor further stated that the claim was filed in 1925 and had no application to this insurance, but I submit, under the law, it covers both insurance and all the benefits under the act.

The COURT.—In the 1925 application, you take into consideration that it does include both, but if he was totally and permanently disabled prior to that time, should it have been filed prior to that time. That is merely a circumstance. [87]

Mr. FLOOD.—I would like an exception.

The COURT.—Note an exception to that.

Mr. POPE.—In connection with Your Honor's instruction, I understood you to say that Dr. Nicholson said that the man was totally and permanently disabled at the date of discharge. You mean at the date of examination in 1925?

The COURT.—How was that?

Mr. POPE.—You said that Doctor Nicholson testified that he was totally and permanently disabled at the date of discharge, if I understood correctly?

The COURT.—I said, in 1925, at the date of examination.

(Jury Retires).

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions may be settled, al-

lowed, signed, sealed by the Court and made a part of the record.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney,
U. S. Veterans' Bureau. [88]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS

The above case coming on for hearing on application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same, together with exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions; and the parties hereto having stipulated and agreed upon said bill; the Court being duly advised, it is by the Court

ORDERED that said bill of exceptions be, and it hereby is, settled as a true bill of exceptions in said

cause, which contains all of the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of the Court [89] is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

It is further ORDERED that the Clerk of this Court attach all of the exhibits in this cause to said bill of exceptions, making the same a part hereof.

Dated this 2nd day of June, 1931.

JEREMIAH NETERER,
United States District Judge.

Copy Received May 28, 1931.

GEORGE E. FLOOD.

OK—

L. L. NEWMAN,
GEORGE E. FLOOD,
Attorneys for Plaintiff.
CAMERON SHERWOOD,
Asst. U. S. Atty.

[Endorsed]: Lodged May 28, 1931.

[Endorsed]: Filed Jun. 4, 1931. [90]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To SEATTLE TITLE TRUST COMPANY, as Guardian of the Estate of VERNON A. PETERSON, Incompetent, plaintiff, and to WETTRICK, WETTRICK & FLOOD, its attorneys:

YOU, and EACH OF YOU, will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on the 3rd day of April, 1931, and that the certified transcript of record will be filed in the said Appellate Court within thirty (30) days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney.

CAMERON SHERWOOD,
Asst. United States Attorney.

LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within this 8 day of .....
WETTRICK, WETTRICK & FLOOD,
Attorney for Plff.

[Endorsed]: Filed May 18, 1931. [14]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 3rd day of April, 1931, does hereby appeal from the said order, judgment and decree, in each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.

CAMERON SHERWOOD,
Assistant United States Attorney.

LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within this 8 day of May, 1931.

WETTRICK, WETTRICK & FLOOD,
Attorney for Ptff.

[Endorsed]: Filed May 18, 1931. [15]

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Cameron Sherwood, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, Seattle, and, in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors, which it avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent, total disability of Vernon A. Peterson during the time his policy was in effect, and to which denial defendant took exception at the time of the interposition of said motion herein.

II.

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the defendant at the time of the interposition of said motion herein.

III.

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV.

The District Court erred in denying defendant's motion for a direct verdict at the close of the entire testimony, which motion was interposed on the ground that Vernon A. Peterson had not been proven to have been permanently and totally disabled from following a gainful [16] occupation in a substantially continuous manner during the time his policy was in effect.

V.

That the Court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI.

That the Court erred in admitting in evidence plaintiff's exhibits 2 to 15, inclusive, to the admission of which exhibits defendant duly objected, on the ground that their admission deprived the government of the right of cross-examination, which objection was overruled and exception noted.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within Assignments of error this 16 day of May, 1931.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Plaintiff.

L. L. Newman
HC

[Endorsed]: Filed May 18, 1931. [17]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On application of the defendant herein, it is hereby

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 3rd day of April, 1931, be, and the same is, hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open Court this 18 day of May, 1931.

BOURQUIN,
United States District Judge.

Approved:

WETTRICK, WETTRICK & FLOOD,
Attorneys for Plaintiff.

Received copy of the within this 8 day of May, 1931.

WETTRICK, WETTRICK & FLOOD,
Attorney for Ptff.

[Endorsed]: Filed May 18, 1931. [18]

(Title of Court and Cause.)

ORDER

(Extending Time for Lodging Bill of Exceptions)

(Excerpt from Trial Record)

* * * The verdict is received, read, acknowledged by the jury, and ordered filed. The jury is discharged from the case and are excused to 10 A. M. next Tuesday. On motion of counsel for the defendant it is ordered that sixty days be granted to lodge proposed bill of exceptions.

Journal No. 19 at Page 68. [19]

(Title of Course and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 3 day of June, 1931, in which to lodge and have settled its proposed bill of exceptions herein; and

It is FURTHER STIPULATED that the present term of Court may be deemed extended for that purpose.

Dated at Seattle, Washington, this 4 day of April, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.
GEORGE E. FLOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 4, 1931. [20]

(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby

ORDERED that defendant herein may have up to and including the 3 day of June, 1931, in which to lodge and have settled its proposed Bill of Exceptions herein; and it is

FURTHER ORDERED that the present term of Court may be deemed extended for that purpose.

Done in open Court this 4th day of April, 1931.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 2nd day of April, 1931.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Ptf.

OK—GEORGE E. FLOOD,
Atty. for Pf.

[Endorsed]: Filed Apr. 4, 1931. [21]

(Title of Court and Cause.)

STIPULATION REGARDING TRANSMISSION OF ORIGINAL EXHIBITS.

It is hereby STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the Clerk of the above entitled Court may send and transmit the original exhibits admitted in evidence herein to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for the purpose of appeal herein, in lieu of copies thereof being printed and transmitted.

Dated at Seattle, Washington, this 18 day of May, 1931.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

.....

Attorneys for Plaintiff.

Received a copy of the within this.....day of ....., 19.....

WETTRICK, WETTRICK & FLOOD,
Attorney for Plff.

[Endorsed]: Filed May 18, 1931. [91]

(Title of Court and Cause.)

ORDER REGARDING TRANSMISSION OF ORIGINAL EXHIBITS.

Upon application of the defendant herein and pursuant to stipulation, it is hereby

ORDERED that the Clerk of the above entitled Court do and he is hereby directed to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit all the exhibits of both parties herein which were admitted in evidence at the trial in lieu of certified copies thereof being transmitted to the Clerk of said Court of Appeals.

Done in open Court this 18 day of May, 1931.

BOURQUIN,
United States District Judge.

Approved:

WETTRICK, WETTRICK & FLOOD,
Attorneys for Plaintiff.

Received a copy of the within this.....day of ....., 19.....

WETTRICK, WETTRICK & FLOOD,
Attorney for Ptff.

[Endorsed]: Filed May 18, 1931. [92]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

You will please prepare certified copies of the within mentioned papers in the above entitled cause, and you will transmit certified copies of the same with your complete transcript to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for his use in connection with the appeal herein.

1. Complaint.
2. Answer.
3. Reply.
4. Verdict.
5. Judgment.
6. Motion for New Trial.
7. Order Denying Motion for New Trial.
8. All stipulations and orders extending time and term for filing bill of exceptions.
9. Stipulation and order regarding transmission of original exhibits.
10. Citation on Appeal.
11. Assignments of Error.
12. Petition for Appeal.

13a. Bill of Exceptions. [93]

13. Notice of Appeal.
14. Order Allowing Appeal.

15. Copy of this Praecipe.

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney,
U. S. Veterans' Bureau.

Received a copy of within Praecipe for transcript this 29th day of May, 1931.

WETTRICK, WETTRICK & FLOOD,
Attorneys for Plaintiff.
F. L.

[Endorsed]: Filed May 29, 1931. [94]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 94, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above entitled cause, as is required by praecipe of counsel, filed and shown

herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant herein for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above cause, to-wit: [95]

Clerk's fees (Act Feb. 11, 1925) for making certificate, record or return, 240 folios at 15¢	$36.00
Appeal fee, Section 5 of Act	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$42.00

I hereby certify that the above cost for preparing and certifying the foregoing record, amounting to $42.00 has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court of Seattle, in said District, this 9th day of June, 1931.

(Seal) ED. M. LAKIN,
Clerk United States District Court,
Western District of Washington.
By TRUMAN EGGER,
Deputy Clerk. [96]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division.—ss.

The President of the United States to:

SEATTLE TITLE TRUST COMPANY, as Guardian of the Estate of Vernon A. Peterson, Incompetent, Plaintiff, and to WETTRICK, WETTRICK & FLOOD, its attorneys:

YOU and EACH OF YOU are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Judicial Circuit, on the 19th day of June, 1931, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final judgment signed and filed on the 3rd day of April, 1931, wherein the United States of America is defendant and Seattle Title Trust Company, as guar-

dian of the estate of Vernon A. Peterson, Incompetent, is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf. [97]

(Seal) BOURQUIN,
United States District Judge.

Received a copy of the within this 8 day of ..... , 19.....

WETTRICK, WETTRICK & FLOOD,
Attorneys for Ptff. [98]

[Endorsed:] Filed May 18, 1931. [97]

[Endorsed]: No. 6490. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Seattle Title Trust Company, as guardian of the Estate of Vernon A. Peterson, Incompetent, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 12, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6490

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE TITLE TRUST COMPANY, AS GUARDIAN OF THE ESTATE OF VERNON A. PETERSON, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF

ANTHONY SAVAGE,
United States Attorney.
CAMERON SHERWOOD,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
Special Counsel, Veterans' Administration.
BAYLESS L. GUFFY,
LESTER E. POPE,
Attorneys, Veterans' Administration.

INDEX

CASES CITED

STATUTES CITED

OTHER CITATIONS

70841—31——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6490

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE TITLE TRUST COMPANY, AS GUARDIAN OF the Estate of Vernon A. Peterson, Incompetent, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF

STATEMENT OF THE CASE

Plaintiff, appellee herein, instituted this suit to recover on a contract of War Risk Term Insurance granted its ward, Vernon A. Peterson, by the defendant while in its military service during the World War.

In its complaint (R. 1–4) plaintiff, after alleging the enlistment and discharge of insured, and the granting of the contract of insurance in the sum of $10,000, alleges in Paragraph IV (R. 3) that

while the contract was in force insured became permanently and totally disabled as a result of an enlargement of the lymphatic glands, disfunction of the cervical glands, a mental disorder, mental deterioration, nervous prostration, and neurasthenia. It prayed judgment for installments from January 1, 1919, the date of insured's discharge from the service.

To plaintiff's complaint defendant filed an answer (R. 5–7) admitting the enlistment and discharge of insured, and the granting of the contract, but denying that insured became permanently and totally disabled as alleged. Further answering (R. 6), the defendant averred that the contract sued on lapsed for nonpayment of the premium due February 1, 1919.

In its reply to defendant's answer the plaintiff denied that the contract lapsed on February 1, 1919, but affirms that the same matured on or prior to that date by reason of the happening of total and permanent disability (R. 8), as alleged in its complaint.

This cause was tried to a jury. (R. 13, 14.) At the close of all plaintiff's evidence the defendant moved the court for a nonsuit on the ground that the evidence adduced on behalf of the plaintiff did not establish a prima facie case, and was legally insufficient to sustain a verdict, which motion was denied. (R. 43.) At the close of all the evidence the defendant moved the court for a directed verdict on the same grounds and reasons assigned in

support of its motion for a nonsuit, which motion was denied by the court. (R. 76.) Whereupon the cause was submitted to the jury, which rendered its verdict for the plaintiff. (R. 9.) Whereupon judgment for plaintiff was rendered. (R. 9, 11.) Thereafter the defendant filed its motion for a new trial (R. 11, 12), which was denied (R. 12, 13). From the judgment in behalf of plaintiff defendant is here with this appeal. (R. 97.)

ASSIGNMENTS OF ERROR

I

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent total disability of Vernon A. Peterson during the time his policy was in effect, and to which denial defendant took exception at the time of the interposition of said motion herein.

II

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the defendant at the time of the interposition of said motion herein.

III

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV

The District Court erred in denying defendant's motion for a directed verdict at the close of the entire testimony, which motion was interposed on the ground that Vernon A. Peterson had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V

That the Court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI

That the Court erred in admitting in evidence plaintiff's Exhibits 2 to 15, inclusive, to the admission of which exhibits defendant duly objected, on the ground that their admission deprived the government of the right of cross-examination, which objection was overruled and exception noted.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations,

not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, and forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs

and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided, however,*

That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further:* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to ered, to be paid by the claimant in behalf of payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable

by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

> That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

"1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all including months of disability already paid for in both cases except as otherwise provided.

"2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates:

* * * *

"Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at the net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(T. D. 20 W. R.)

TOTAL DISABILITY

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act

the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.
W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT I

The court erred in denying defendant's motion for a nonsuit and its motion for a directed verdict.

Treasury Decision Number 20, page 10 of this brief, which is a regulation promulgated under sanction of law and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation * * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover it must produce some substantial proof that the insured, Vernon A. Peterson, within the time alleged in its complaint, namely, January 1, 1919, or prior to midnight of the 28th day of February, 1919, as charged by the court, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

Ruth Peterson for plaintiff testified (R. 15–23) that after his discharge insured went to California, where he worked a couple of weeks loading cars. That he then returned to Seattle, Washington, and went to work around July, 1919, working quite steadily on the street cars for two months on the extra list. That he was then transferred to the car

barn, and became head mechanic and continued to work there for six months, when he resigned. That after leaving the car barn he worked in a garage for two months and then did nothing for a few months and then commenced working for the Mission Theater. That insured was in the show business from May 1, 1921, until the middle of 1924. That after quitting this theater insured went to California, but did not work much there. That he returned to Tacoma, Washington, and worked in a theater there about three months, when he quit and returned to Seattle, Washington, where he tried to work, but did not do much and was placed in an asylum for the insane in the fall of 1925. This witness further testified (R. 18) that while insured worked at the car barn he went to work at eight o'clock and worked eight hours. That his work was quite steady. That he ate his meals regularly and spent his evenings at home.

This witness further testified in detail with reference to the nervousness of the insured, his peculiar habits in many instances, and odd things that he did. However, her testimony stands that he worked for the periods heretofore mentioned.

Other witnesses testified as to the peculiarities and idiosyncrasies of the insured. However, it appears from their testimony that the insured was engaged in different lines of work with reasonable continuity.

Dr. E. A. Nicholson for plaintiff testified (R. 34–38) that he examined insured on August 20, 1925,

April 8, 1926, and December 12, 1929, and that in the opinion of witness insured was not fit to take up any work at the time witness first examined him. This witness testified that insured's disability was paresis caused by syphilis, and went into great detail in explaining this disease.

On cross-examination this witness testified (R. 38) that he never saw insured until August, 1925. That a person may have syphilis for twenty years and never show any brain involvement and that up to the time a brain involvement develops syphilis constitutes little or no disability.

Harry B. Flanders for defendant testified (R. 49) that he was employed in the City Comptroller's office in the city of Seattle, and had warrants in connection with the employment of insured in 1919 and 1920. That the employment was apparently continuous. That there were twenty-three warrants dated from July, 1919, to June, 1920. That the checks are as follows:

> July 25, 1919, drawn for $54.98; August 11, 1919, for $62.42; August 26, 1919, for $64.94; September 10, 1919, $27.49; September 25, 1919, for $22.71; the next is for October 10, 1919, for $26.03; the next for October 25, 1919, for $63.98; November 10, 1919, for $58.40. The next for November 25, 1919, for $57.09; December 10, 1919, $57.75; December 24, 1919, $66.94; January 10, 1920, $65.30; January 27, 1920, $67.59; the next is for February 10, 1920, in the amount of $68.91; February 25, 1920, $56.44; March 10, 1920, for

$59.72; March 25, 1920, for $68.25; the next is April 10, 1920, for $72.18; April 27, 1920, for $68.25; May 10, 1920, for $68.25; May 25, 1920, $73.50; June 10, 1920, for $64.31; and June 25, 1920, for $15.09.

A. H. Grout for defendant testified (R. 51) that he had charge of the records of the Civil Service Department of the city of Seattle, and that same show that insured was first employed in July, 1919, and resigned June 4, 1920.

Albert Pohl for defendant testified (R. 54) that he was employed during the years 1919 and 1920 by the Municipal Railway; that he knew insured and worked directly with him. That insured was first hired as a machinist's helper and did that work. Shortly after that insured was put to work overhauling automobiles and repaired automobiles until the first part of June.

E. L. Newman for defendant testified (R. 60) that he was employed by the A. V. Love Dry Goods Company in 1928. That he knew insured, and that insured worked as a fireman for the same company and performed his duties all right in September and October, 1928.

Harriet Anderson for the defendant testified (R. 61) that she was bookkeeper for the Seattle Office Equipment Company. That she had the records of employment of insured by said company and that he was employed from April 5, 1929, to January 5, 1930, at the rate of $22.50 per week.

K. R. Terry for defendant testified (R. 61) that he was employed by the Seattle Office Equipment Company in 1929 and 1930 and that insured was an employee of the same company at that time. That witness observed insured there at that time. That insured was doing janitor work in the store and that his work was fairly satisfactory.

Margaret Mahan, a witness for defendant, testified (R. 74) that she was formerly employed by the Mission Theater in 1920 or 1921, and was there about six months. That insured was there when she first went there and managed the theater. That insured was there in the evening to see that the place was running and that during the day he fixed the films and things like that.

While the witnesses for plaintiff testified as to the different peculiarities of the insured, his nervousness and inattention to business at some times, the fact remains that their testimony shows that he worked with great continuity from shortly subsequent to his discharge until some time in 1925.

The testimony on behalf of defendant, which is uncontradicted, shows that the insured worked for the street car company from June, 1919, until June, 1920, with reasonable continuity and at substantial wages. Defendant's testimony further shows other employment at substantial wages.

In the case of *Owen D. Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court quoted with approval from

Woolworth Company v. *Davis* (C. C. A. 10), 41 Fed. (2d) 343, 347, as follows:

> When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it. *American Car & Foundry Co.* v. *Kindermann* (C. C. A. 8), 216 Fed. 499, 502; *Missouri, K. & T. Ry. Co.* v. *Collier* (C. C. A. 8), 157 F. 347, cert. denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments can not and should not stand if they are entered upon testimony that can not be true.

The evidence in the case at bar discloses the physical fact that insured worked with reasonable continuity for substantially gainful wages for a period of six years. Therefore, under the ruling in the Nicolay case, supra, the testimony of the witnesses, indicating that insured was not able to do this work, should not be held to be "substantial evidence" sufficient to support the finding for plaintiff.

It appears from the testimony of Dr. E. A. Nicholson, a witness for plaintiff (R. 34) that insured's disability was caused by syphilis. Hence it seems that we have in this case a suit on a war-risk insurance contract where it will hardly be contended that the disability claimed was due to the insured's war service. Therefore there is no call for the applica-

tion of the rule intimated in some decisions in suits of this character that such contracts should be liberally construed in favor of the insured.

POINT II

The court erred in denying defendant's motion for a new trial and in entering judgment on the verdict.

For reasons assigned in the argument in support of Point I hereof, it was error in the trial court to deny defendant's motion for a new trial and entering judgment on the verdict in plaintiff's behalf.

POINT III

The court erred in admitting in evidence plaintiff's exhibits two to fifteen (2–15).

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay in that they report simply what the doctor making them says he found upon examination of insured and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the insured, which are clearly self-serving. In this connection it should be kept in mind that at the time the exami-

nations were purported to have been made the insured had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made for the defendant were for the purpose of determining whether insured had any disability. Therefore, it was to the interest of the insured that he have a disability and certainly any statements he made at such a time fall within the class of self-serving statements the same as any statements a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this brief understand, always excluded from evidence. Again by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the Cole case, l. c. 341, the court said:

> There was no error in the admission of appellee's Exhibits H and I. These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports

> which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the *Cole case* only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the *Runkle case,* l. c. 805, the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that

his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.

The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States Government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *

This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their

> reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war risk insurance case, such reports and records. In *Evanston* v. *Gunn,* 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the *Runkle case* required that reports of the character of plaintiff's Exhibits should be properly identified. Furthermore, in view of the use of the language, "Particularly is this true of findings of a physical examination," and the language, "It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the *Wilson case* (not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error: First, that the court erred in admitting certain replaintiff, which were contained in the files ports of physical examinations made of the

of the United States Veterans' Bureau; second, that the court erred in not directing a verdict for the defendant.

The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat,* decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case,* there was no question of the admission of anything other than the certificate of the physicians, and the field-hospital tags were entries made by the field-hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving declarations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, relied upon by attorneys for the plaintiff, are easily distin-

guished from the instant case, and assuming without deciding that the reports in those cases were properly admitted these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

For the foregoing reasons it is respectfully submitted that the judgment be reversed.

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No. 6490

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SEATTLE TITLE TRUST COMPANY, as Guardian of the Estate of VERNON A. PETERSON, Incompetent,

Appellee.

Upon appeal from the United States District Court for the Western District of Washington, Northern Division

Brief of Appellee

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Brief of Appellee

STATEMENT OF THE CASE.

Vernon A. Peterson (to whom we shall hereinafter refer as the plaintiff), an incompetent World War Veteran appearing by the Seattle Title Trust Company, his legal guardian, in an action upon his

War Risk insurance contract and after the trial of his cause before a jury, recovered a judgment wherein he was adjudged permanently and totally disabled and entitled to the proceeds of his policy since his discharge from the service. His recovery is challenged by the Government in this appeal upon two grounds: *First,* that the evidence submitting the cause to the jury was insufficient to permit a finding of permanent and total disability while the policy was in force; and *second,* if the evidence was insufficient, the trial court erred in admitting certain records and medical reports of the United States Veterans Bureau, to whose care, treatment and supervision the plaintiff had, on various occasions since his discharge, submitted himself.

PLAINTIFF'S EVIDENCE SUFFICIENT FOR SUBMISSION TO JURY.

A party litigant is entitled to a jury trial of every issue of fact. Under the sanction of our Constitution one may not be deprived of his right to a trial by jury. The principle controlling the right to a trial by jury and the corollary power of a Federal court to direct or instruct a verdict, can scarcely be better stated than in the language of the late Justice Gilbert, recently cited in the War Risk insurance

case of *United States vs. Burke* (opinion filed June 1, 1931):

> "Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.
>
> "And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. *Travelers' Ins. Co. vs. Randolph,* 78 Fed. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. vs. Lowery,* 74 Fed. 463, 20 C. C. A. 596; *Rochford vs. Pennsylvania Co.,* 174 Fed. 81, 98 C. C. A. 105; *United States Fidelity & Guaranty Co. vs. Blum,* (C. C. A.) 270 Fed. 946; *Smith-Booth-Usher Co. vs. Detroit Copper Mining Co.,* 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:
>
> "'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto.'"

United States Fidelity & Guaranty Co. vs. Blake, 285 Fed. 449, 452.

Again,

> "such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict." *Marathon Lumber Co. vs. Dennis,* 296 Fed. 471, C. C. A. 5.

A total and permanent disability within the meaning of the War Risk insurance policy has been so frequently authoritatively defined by this and other Circuits that it is unnecessary to do more than restate the interpretation which our own Circuit has placed upon it.

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation." *United States vs. Sligh,* 31 Fed. (2d) 735.

Let us also bear in mind that every reasonable presumption is to be indulged in, in favor of the insured who is entitled to the most liberal construction of his policy.

U. S. vs. Cox, 24 Fed. (2nd) 944;

Starnes vs. U. S., 13 Fed. (2nd) 312;

Law vs. U. S., 290 Fed. 972;

Ford vs. U. S., 44 Fed. (2nd) 754;

Phillips vs. U. S., 44 Fed. (2nd) 689;

Quirk vs. U. S., 45 Fed. (2nd) 631;

U. S. vs. Sligh, 31 Fed. (2nd) 735;

U. S. vs. Eliasson, 20 Fed. (2nd) 821.

Furthermore, it is the recognized law of war risk insurance that the insured in an action upon the policy is entitled to the most favorable aspect which his evidence will bear. *Eliasson vs. U. S.,* 20 Fed. (2nd) 821; and *Godfrey vs. U. S.,* 47 Fed. (2nd) 126.

With these guiding principles in mind it now becomes necessary to inquire into the evidence to determine whether there was any substantial testimony which, if accepted or believed by the jury would establish, or tend to establish, either by direct proof or reasonable inference, that the plaintiff was permanently disabled on or before the lapsation of his insurance policy, so that he thereafter was unable to pursue continuously a substantially gainful occupation. If there was any such testimony, the case was clearly for the jury, notwithstanding any contrary or conflicting evidence which may have been introduced by the defendant.

"It is not the province of the court to determine the weight or preponderance of the evidence. That is the function of the jury. The court could, if there was no substantial evidence to support a recovery, direct a verdict for the defendant, but if the proof of the material facts was such that reasonable minds might draw different conclusions, one of which would sustain the plaintiff's claim, then the court is not justified in taking the case from the jury." *Spencer vs. U. S.*, C. C. A. 5th, 47 Fed. (2nd) 501 (a war risk insurance case).

TESTIMONY SUPPORTING VERDICT OF THE JURY.

The plaintiff, Vernon A. Peterson, did not himself testify, the evidence indicating that at the time of the trial he was committed as an incompetent to the United States Veterans Bureau Neuro-Psychiatric Hospital No. 94 at American Lake. It appeared from the testimony that the plaintiff was married to Ruth Peterson during the period of his military service in 1918. That plaintiff was discharged from the military service January 25, 1919. The plaintiff upon numerous examinations by physicians of the United States Veterans Bureau disclosed to the examiners that he had contracted and had been treated for the disease of syphilis during his military service (plaintiff's Exhibits 2 to 15 inclusive). Substantive evidence of such treatment

was furnished in the course of trial by means of plaintiff's Exhibit No. 7, which was not a statement volunteered by the plaintiff but was significantly the summary of a search and inquiry by bureau officials into the original hospital records of the Medical Department at Camp Lewis made by the military medical authorities during the period while plaintiff was stationed there on military duty.

> "Records from the Base Hospital, Camp Lewis, Washington, dated June 25, 1918, state that the patient was treated there for syphilis while in the military service at that station. The neurological and psychiatric findings in this case are those of general paralysis. Laboratory examinations made at this hospital on April 28, 1926, and at Porro Laboratory, Tacoma, Washington, on April 29, 1926, do not show the typical paretic serology; however, the laboratory reports from Cushman Hospital, dated September 9, 1925, show a paretic curve, an increase in cells and a four-plus Wasserman of the spinal fluid, together with a one-plus Wasserman of the blood. Records show that the patient has been given active anti-luetic treatment and it is the opinion of the staff that the present report on the spinal fluid and blood Wasserman indicated a modification of the spinal fluid and blood findings by reason of treatment. The negative spinal fluid is due to mercurial and arsenical therapy. The patient is incompetent, inadaptable socially and economically and in need of further anti-luetic treatment." (Plff's. Ex. 7.)

It is also to be observed that the records fur-

nished by the Office of the Adjutant General of the United States disclose that the soldier was found at Camp Lewis to be suffering from extra large and lymphatic glands in the groins and extra small left cervical glands.

Thus we have objective evidence, uncontradicted anywhere in the record, that the plaintiff during service was a victim of one of the most dreadful disease which ever afflicted the human race.

The first medical examination after the plaintiff was discharged from service is that made by Dr. D. A. Nicholson on August 20, 1925. Dr. Nicholson was qualified as a specialist whose practice is limited to nervous and mental diseases (R. pp. 34 to 39). The diagnosis which the doctor made on the occasion of this examination was cerebrospinal syphilis classified as general paralysis of the insane, a disease of the brain and spinal cord caused by a syphiletic infection. As a result of the infection one part of the brain became more involved than some other part. (R. 35.) The physical symptoms produced by this disease were enumerated by the doctor as a slurring of speech, irritability, a tendency to forget, a change in the reflexes, mental conditions, unsteadiness, exalted ideas, and also depressed and quiet mental dispositions, a weakening

of the mental faculties, loquaciousness, emotional instability—laughing and crying (R. 34-35-36). The doctor found him at that time unable to take up any work and suffering from a permanent and progressive disease which, having lodged in the spinal cord and having involved the brain, was incurable, and subject at best to but temporary remissions. (R. 37 and 38.)

The doctor explained that the disease constituted no disability whatsoever until it involved the brain or spinal cord, but that after it lodged in the brain or spinal cord a train of symptoms indicating mental deterioration was produced; that these symptoms were "incident to paresis in the later stages." (R. 36, 37, 38.) These periods of remission, he testified, occur in the case of general paralysis and sometimes the patients get better so that they may return to their occupations, but only temporarily, varying the length of time from a short period to as much as two or three years. Moreover, that on some of his subsequent examinations he found the plaintiff better than he was on the first examination, but such improvement was, in his judgment, but a mere temporary remission to be followed in each case by a recurrence. (R. 38.) Further he declared that, while many cases of syphilis did not involve the

brain or nervous system, frequently such involvement was found in a large number of cases from the time a person contracts the infection. (R. 38.)

Later during the course of the trial Dr. I. R. Quilliam, chief of the neurological section of the U. S. Veterans Bureau, was called as a witness for the defendant. He testified that syphilis in the third stage manifested itself by striking the nervous system and in certain cases by affecting the spinal cord, the covering of the brain or the brain itself and that when it does so it usually results in a form of insanity. (R. 65,66.)

He declared that the disease is a progressive one and that the time required to progress from the second to the third stage is indefinite and that in some cases the third follows the second very soon; and that some men who acquire this infection become invalids very soon. (R. 67.) He testified that where you find mental manifestations, and an impairment of the mental faculty, the disease has reached an involvement of the brain and spinal cord. He further testified that the involvement of the brain was subsequent to and more serious than the mere involvement of the spinal cord in that the former produced mental impairment while the latter resulted in nervous disorders, and that he on his examination had

found symptoms suggesting involvement of the brain as well as of the spinal cord. (R. 68, 69.) He, too, found the outlook for recovery, that is, the prognosis, to be guarded and unfavorable. (R. 70.) When he first examined him in 1925, one of the symptoms which he noted indicating an involvement of the brain was the slurring of speech resulting from an impairment of the nerves that control the muscles of the tongue, which he said was characteristic of cerebal-spinal syphilis. (R. 74.)

Likewise, in the long series of examinations of the plaintiff in the U. S. Veterans' Bureau, the reports of which examinations were put in evidence in plaintiff's Exhibits 2 to 15, an impairment of mental processes, defects of memory, slurring speech, loquaciousness, mild euphoria, explained as meaning ideas of exaltation and well-being, an increase in some reflexes and a decrease or absence of other reflexes, emotional instability, grandiose ideas, a halting and ataxic manner of speaking, a twitching of the facial muscles, together with constant, coarse, irregular tremor of the thumb and fingers, inco-ordination in the movement of muscles and the limbs, volitional and mental deterioration, social and economic inadaptability, irritability and a lack of insight into his condition as well as a lack of judgment—these

and many other characteristic symptoms were invariably noted in practically every examination. He was invariably pronounced incompetent, socially inadaptable, in need of a guardian, and, owing to the nature of the disease, recovery was said to be guarded, doubtful and unfavorable.

From the moment that the plaintiff found himself under the care and treatment of medical men, there is no question of the totality and the permanency of the disease or of his disability. There remains for consideration the period dating from his discharge from service, extending up to August 20, 1925, when he was first medically examined. For a true picture of his condition throughout this period we must rely upon the testimony of those who knew him and associated with him and were thus in a position to report the facts bearing upon the situation. The Government, of course, sets forth its view of the testimony. In a few brief lines the Government would summarize the testimony of Ruth Peterson, wife of the plaintiff, as well as the testimony of plaintiff's several other witnesses, and would make it appear that the plaintiff worked with regularity from the date of his discharge until 1925 and did so without any serious interference resulting from his disease and disability. Such a conclusion or such an inference in the judgment of the appellee

cannot properly be derived from the testimony of either Mrs. Peterson or any of the other witnesses for the plaintiff. It can only be adopted by distorting actual testimony, by placing undue emphasis upon certain statements and omitting entirely the context in which such statements appear. Let us turn to the actual testimony of the witnesses. Ruth Peterson testified she was the wife of Vernon A. Peterson, now a ward of the Seattle Title Trust Co.; that they were married November 15, 1918. That he was discharged January 25, 1919. After discharge witness and plaintiff went to California for his health and visiting for a short time with his mother. Plaintiff then went to Los Angeles to obtain work. Witness' testimony then continues:

> "He worked for a short time right after I got down there, loading cars * * * around a couple of weeks. During the time he was employed in Los Angeles he was very nervous. He would pace up and down the room. * * * After he had eaten his supper he would faint away—fall out of his chair. He would topple over that way. That condition would continue for several minutes. He would finally get out of it *and would be out of his head altogether.* * * * He was very pale. He had a glary look in his eyes. His eyes were inflamed. * * * He would go to this company loading cars for them. * * * He worked * * * a couple of weeks. He had fainting spells and he would come home in the evening after dinner. They would come in succession. * * * After he quit his job we returned

> to Seattle. After he had fainting spells he was out of his head *and made strange, gurgling sounds.* When he first came out of it he was nauseated. He complained of being very sick after these spells. He had these fainting spells before he quit." (R. 16 and 17.)

Witness then testified that she and plaintiff returned to Seattle. Plaintiff started to look for work and went to work on the street car as conductor for the City of Seattle, this being around July, 1919. She then testified:

> "He worked there about two months on the street car. He had broken shifts with no definite hours. The shifts varied—most of his shifts were at night. * * * He would work over a period of probably four hours. * * * He worked quite steady—as often as there was work for him on the extra list. * * * He was transferred from the street car to the Georgetown car barn, where he was head mechanic." Witness then testified that plaintiff worked

eight hours a day quite steadily about six months, ate meals regularly, spent evenings at home. This was in 1919 within a few weeks after his discharge. Witness Ruth Peterson then continued:

> "He was very nervous and uneasy. He would pace back and forth—go to one chair and sit in it, then pace back and forth, then to another. He was extremely nervous. * * * I was never in the car barn while he was working there. He would pace around the room back

and forth. Back and forth again. On the go continually. He did not sit down."

Witness then continues:

"He had a peculiar expression from his eyes. It was glassy and very stary. The eyes would bulge. Outside of being extremely nervouse, pacing back and forth, back and forth, I have nothing definite in mind. *He stammered quite a bit.*"

Witness then testified that when plaintiff left the car barn he went into a garage. The garage was very small. He was there for two months. That he worked on only one car. That she actually saw him work on the car. "He was very awkward in picking up tools. * * *." (R. 15, 16, 17, 18, 19.)

Mrs. Peterson further testified that the only car that the plaintiff had for repair would not run when he finished repairing it. Ruth Peterson further testified that after the garage episode the plaintiff finally went to the Mission Theater. Witness testified that during this time:

"He was very nervous. He would start to do one thing, and then do something else. He would start to pick up something and couldn't find it. * * * I would go with him to the theater and then go with him to get the films. We would go to the film exchange with the films the night before and get advertising and films into the car and we would go back. We had everything written down for the night's per-

formance and I would watch to see that he got everything for the night's business."

Witness then testified that plaintiff worked as a sort of janitor, cleaning out the show-house. That plaintiff's partner managed and that she was with him constantly and saw that everything was done right. That she was with him as constantly as she could be but that she had four small children and could not always be with him. Further:

"His whole ambition was to make a living. He was attached to the children."

That when he was sent for pictures he would return with the wrong pictures, or might not bring pictures back at all and the show could not be started. Further:

> "In the evening if someone wasn't there to watch him he would leave the front and back doors (of the showhouse) wide open, and many times he left his night's receipts in the box office window. It was part of his duty to put the money away. *This conduct continued all the time he was in the show.*" (R. 19, 20.)

This erratic, and irresponsible conduct continued throughout the entire period plaintiff was in the show business, and the burden of managing the business fell largely to his partner and the witness, his wife.

The record then states that the witness and plaintiff left the Mission Theater and again went to California for his health and to visit his mother. She further testified:

> "He was nervous on the train and the muscles of his face would twitch in every direction and he had a stroke while he was in the theater afterwards, on the side." * * * "Sometimes it would strike his tongue and sometimes he could not talk. Sometimes it would strike his hand."

That this occurred very frequently and lasted for about a year. They were in California for a short time, and upon their return to Washington they again went into the show business in Tacoma. That immediately thereafter he disappeared with an automobile for a period of about two weeks without accounting for his absence. She ran the theater and took care of the four children. Further:

> "And when I would tell him he would have to help he would pout, and one night he come into the theater without any trousers on."

This was while witness was playing the piano and when she asked him why he did this, he said, she testified,

> "he said he didn't do anything. His mind seemed to be blank. There wasn't anything there. It (his having come into the show with-

> out any trousers) didn't seem to affect him. He didn't seem to know what happened, and then I finally made him go to bed. * * * I would ask him to put the car away and then he would go into the theater and peek around the curtain and see if I was watching him. * * * I talked to him and told him he could not go without his clothes and he said, 'I will go out there without any clothes on.'" (R. 21-22.)

This continued for a period of about three months. The witness and plaintiff then returned to Seattle. He tried to work. The witness testified:

> "Each time he would say he had a job, and he only lasted about an hour on a job. That continued until he was put in the hospital."

Further she testified, in the hospital:

> "He does only little things. He recognizes me and wants to show me everything like a little child. I have taken the children over there (to the hospital). He is glad to see the children, but he is more like a child than a father."

The witness further testified that on occasional furloughs from the hospital he would come home

> "at one time he was home for a period of eight months. He would fly in rages towards me and he came after me with a butcher knife and then another time he came after me with clenched fists, and if he wasn't pampered I could not stay with him and I humored him on every occasion." (R. 21, 22.)

It will be noted that the complete record of Ruth Peterson's testimony creates a preponderating picture of mental and physical disability, not even hinted at in the Government's summary of two or three lines. This but illustrates the wisdom of leaving disputed questions of fact to the jury, whose determinations will not be disturbed upon appeal. However little plaintiff's view of the testimony may have impressed the appellant, it was by the verdict accepted and credited by the jury, and having merged into the judgment, is not reviewable upon appeal.

Appellee respectfully invites the attention of the court to the testimony of the witness, Dan Mango. He resides in Georgetown, Seattle, knew the plaintiff since 1919, until he went to the hospital; had frequent opportunity to observe him during this period. In 1919 the witness prepared a suit of clothes for plaintiff. Later he made a contract with plaintiff for advertising on the theater curtain. He testifies that he repeatedly asked him to come in and try on his suit and when the plaintiff came in, he was all excited and after having prevailed upon plaintiff

> "a half dozen times, I got him in front of the store and got him in and while he was trying

> the coat on he was nervous and gritting his teeth, so I asked him if he was nervous or anything or if he wanted a glass of water and he said 'Oh, no.' That was in May, 1919."

After that witness saw him many times and testified:

> "He acted about the same. He was always nervous and excited. He stuttered quite a bit."

Witness further testified that he continuously insisted that the ad for which he had contracted be put on the theater curtain, but while plaintiff continuously promised to put it on the curtain he never did so, but whenever he saw him on the street and spoke to him he looked excited, and sometimes would answer him by saying "Hello." (R. 39, 40.)

Witness C. F. Graves, police officer, stationed at Georgetown Station, Seattle, knew Peterson since 1920, observed that he was a very nervous and excitable person; found the doors of the theater unlocked. (R. 42, 43.)

Witness L. H. Collins, another police officer from Georgetown Station, knew Peterson since 1921. In the course of his duties came in contact with Peterson. Plaintiff Peterson often came to the police station, made various reports.

> "I saw him personally come into the station and I would walk up to the window and ask

him what he wanted, and he would turn away and go away. It seemed he would report that somebody was watching him—imaginary, apparently."

When witness went into the show he saw plaintiff "and he would seem to be chasing around all over the house for no purpose."

That everybody noticed this. That plaintiff was nervous and fidgety, was not very neatly dressed. He looked as though he needed a shave and maybe a bath, as though he wasn't very clean. (R. 39, 40.)

Emil St. Micheal testified that he was step-father-in-law of plaintiff. He saw plaintiff consistently and they knew each other very well, were very friendly, that plaintiff would go right by him and wouldn't say anything at all and when witness spoke to plaintiff

"he would just look at me and turn his head"; that when he went to buy films for the theater he would forget what films to get; that plaintiff would come to witness and ask him to go in to get films that the film store would be closed and there would be no films to start the show. (R. 32, 33.)

Witness W. J. Carey testified that he was a sergeant of the police; in 1922, at the Georgetown Station. He knew the plaintiff. Plaintiff came in and made complaints at night. That he investigated

the complaints and found them without basis. "He acted as though he were hopped up. He acted like a hophead, like a man full of dope." That when he was running the show he would go about ill-clad, three or four days growth of beard on his face. That plaintiff would put out posters advertising a show. "There were posters out at times of shows that had not been run at all." Also, "He would have a show going on and the wrong posters there." (R. 29, 30.)

Witness W. J. Jones, another police officer, testified observing plaintiff Peterson from 1921. "He was very flighty." He did not speak consistently. He complained to witness to clear up his show house and, on investigation, there was nothing to clear up. "He was always excited in the theater. At times he was awfully excited and would speak to no one. Very flighty." Observed him in 1921, 1922 and 1923. In 1923 and 1924 "he commenced to be in very bad shape. Less bright, growth of beard on his face, clothes half off." (R. 31.)

The testimony of witness Jenny Powers is of the same tenor. (R. 26, 27 and 28.)

Attention of the court is invited to the cross-examination of the several witnesses, particularly of witness Ruth Peterson as well as the direct examination of witness Ruth Peterson as well as to de-

fendant's Exhibits 1 and 2. Throughout the period when the show business was being operated by plaintiff, his partner and his wife the Government would have the court believe plaintiff was actively engaged in managerial and executive capacities. The testimony of all the witnesses of the plaintiff negative this conclusion.

It is significant that the appellant on behalf of the Government in its appeal furnishes but sketchy, slight and fragmentary excerpts from the plaintiff's testimony. The larger portion of the testimony consists of the testimony offered by the defendant's witnesses during the trial below. Thus it becomes apparent, even from the Government's own brief—and it is clear and indisputable from a consideration of the entire bill of exceptions, including the affirmative matter set forth in the brief of the appellee—that there were two views of the facts submitted to the jury. One was the theory of the plaintiff, which stood out plainly in the testimony, picturing a man who contracted a disease in service while his insurance policy was in full force and effect; a man who immediately upon the date of his discharge from service manifested unmistakable and characteristic signs and symptoms of an infection which had already lodged in the spinal cord and the covering of

the brain. Its existence at this early stage was demonstrated by the nervousness, the weakness, the fainting spells, the stuttering which was later identified as scanning of speech, the lack of power to accomplish mental concentration, the defect of memory and of reasoning processes and the consequent absent-mindedness, his inability to stand the responsibility of conducting his employment or managing his business. It is unnecessary to prolong the citation of these significant symptoms. Suffice it to say that the plaintiff was unable to pursue continuously a gainful occupation throughout the period of 1919 to 1925. Each pursuit he abandoned in the face of his physical and mental disqualifications. Nor would it be fair to the plaintiff to say that he pursued the theater business from 1920 to 1925. It is to be noted from his wife's testimony and even from the cross-examination of the Government's witness, Mr. Martin, that Mr. Peterson took over a going business when he entered the theater in 1920. He had the aid of his wife, an accomplished musician, and the management of his partners, Mr. Woodhouse and Mr. Lily. Yet in spite of that fact we find some time later that the builder, Mr. Martin, who testified for the Government (R. 58, 59), was obliged to repossess the building and take the property away

from Mr. Peterson. The truth is that Mr. Peterson's venture into the theater business was a total failure and only a further confirmation of the exaltedness and grandeur so characteristic of his disease. It was anything but the pursuit of a gainful occupation.

It is obvious that the Government rely in its assignment of error upon the proposition that the existence of total and permanent disability is conclusively negatived as a matter of law by a showing on the part of the Government that the plaintiff pursued an employment over a certain period of years, irrespective of the fact that the plaintiff's testimony proves—and the jury must have believed—that the plaintiff's attempts at employment were unproductive, irregular, and accompanied throughout by the irrepressible appearance of mental disintegration and consequent impairment due to the invasion of the coverings of the brain by the infection from his disease.

The question of permanent and total disability is a question of fact, under cases hereinbefore and hereafter cited. That it is so is proven by the Government's contention that its testimony on defense disproved the testimony offered by the plaintiff. Such a clear conflict of testimony, so characteristic

of most law suits, is solely for the jury's consideration.

The Government's view, which in its testimony and its argument it propounded to the jury, was that the plaintiff suffered no disabilities and no nervous or mental disease until 1925, when their own doctor, the witness Quillam, examined him and attempted to say that he was then in an incipient stage of neuro-syphilis. The Government's view of the testimony was properly rejected by the jury. The jury chose to accept the plaintiff's version. Its finding is final on this disputed question.

It is the universal rule that where some fact is put in evidence by the plaintiff and where that fact is controverted by the defendant, plaintiff is entitled to have issue tried by a jury. It is only where the evidence is wholly undisputed or so conclusive as to admit of no contrary view; only where reasonable minds can draw but one inference from the testimony that the determination of questions of fact may be withdrawn from the jury. Every inference fairly or reasonably to be derived from the evidence must, upon a consideration of this legal question, be construed in the plaintiff's favor. The question of credibility of the witnesses or the weight of testimony is entirely for the jury. Whether the evi-

dence of the plaintiff be strong or weak, if he offers evidence to support an issue tendered it is for the jury and not the court to pass on it. No amount of contradictory evidence will warrant a court withdrawing a case from the jury. Thus it is that in reviewing the decisions of the trial court every reasonable intendment is indulged in favor if its judgment and in favor of the verdict submitted by the jury of the court below.

Matters of fact are settled by the verdict of the jury and its finding is conclusive upon the court of error and review. If there is *any evidence reasonably tending to support the verdict,* then that verdict can not be questioned on review. These principles are, of course, fundamental and have been recognized as sound in the recent war risk case of the *U. S. vs. Burke*, 50 Fed. 2nd 653. Among the authorities which recognize these principles as controlling law may be cited the following:

Encyc. Fed. Proced., Vol. IV, Sec. 1416;

Bewditch vs. Boston, 101 U. S. 16, 25 L. Ed. 980;

Keyes vs. Grant, 118 U. S. 25, 30 L. Ed. 54;

Phoenix Mutual vs. Doster, 106 U. S. 30, 25 L. Ed. 65;

Encyc. Fed. Proced., Sec. 1416;

Oscanya vs. Winchester Arms, 103 U. S. 261, 26 L. Ed. 539;

Slocum vs. New York Life, 228 U. S. 364, 57 L. Ed. 879;

Congress, etc., vs. Edgar, 99 U. S. 645; *Encyc. Fed. Proced.,* Sec. 1417;

Alaska Fish, etc., vs. McMillan, 266 Fed. 26;

Bldwin, etc., vs. Jardine, 261 Fed. 861;

Connecticut Mutual vs. Lathrop, 111 U. S. 612, 4 S. C. 533, 28 L. Ed. 536;

Phoenix Mutual vs. Doster, 106 U. S. 30, 1 S. C. 18, 27 L. Ed. 65;

N. Y. C. & H. R. vs. Froloff, 100 U. S. 24, 25 L. Ed. 531;

McGuire vs. Blaunt, 199 U. S. 142, 50 L. Ed. 125;

Central National Bank vs. Royal Ins., 103 U. S, 783, 26 L. Ed. 459;

Anderson vs. Smith, 226 U. S. 439, 57 L. Ed. 289;

Standard Life, etc., vs. Thornton, 100 Fed. 582;

Bank of U. S. vs. Cerneal, 2 Pet. 543; 7 L. Ed. 513;

Vaughan vs. Blanchard, (Pa. S. C. T.) 4 Dall. 124, 1 L. Ed. 769;

Dernberger vs. B. & O. Ry., 243 Fed. 21;

Encyc. Fed. Proced., Sec. 1417, p. 932;

Missouri K. N. T. Ry. vs. Hall, 87 Fed 170;

Mutual Life, etc., vs. Graves, 25 Fed. (2d) 705;

Engstrom vs. C. N. Ry., 291 Fed. 736 (reversed 299 Fed. 929);

New Jersey, etc., vs. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Fidelity Casualty, etc., vs. Glenn, 3 Fed. (2) 913;

Brockett vs. New Jersey Steamboat, etc., 19 Fed. 156 (affirmed 121 U. S. 637), 30 L. Ed. 1049;

7 *S. C. T.* 1039;

Russell vs. Post, 138 U. S. 425, 34 L. Ed. 1009;

Mauloir vs. American Life Insurance, 101 U. S. 708, 25 L. Ed. 1077;

Encyc. Fed. Proced., Sec. 1417;

Delk vs. St. Louis, 220 U. S. 580, 55 L. Ed. 590;

Ewing vs. Burnett, 11 Pet. 41, 9 L. Ed. 624;

Strather vs. Lewis, 12 Pet. 410, 9 L. Ed. 1137;

Aetna Life vs. Ward, 140 U. S. 76, 11 S. 720, 35 L. Ed. 371;

B. & O. R. Co. vs. Proeger, 266 U. S. 521, 45 S. C. 169, 69 L. Ed. 419;

Penn. vs. Green, 140 U. S. 49, 35 L. Ed. 339;

Bank of Wash. vs. Triplett, 1 Pet. 25, 7 L. Ed. 37;

Bank of U. S. vs. Carneal, 2 Pet. 543, 7 L. Ed. 513;

Sudbury vs. Pennsylvania, etc., 263 Fed. 76;

Heh vs. Duncan, 13 Fed. (2) 794;

Suchardt vs. Allen, 1 Wall 539, 17 L. Ed. 642;

Rochford vs. Pennsylvania, 174 Fed. 81;

Roach vs. Hulings, 16 Pet. 319; 10 L. Ed. 979;

First National Bank vs. Jones, 21 Wall 325, 22 L. Ed. 522;

Barreda vs. Silsbed, 21 How. 146; 16 L. Ed. 86;

Nutt vs. Minor, 18 How. 286, 15 L. Ed. 378;

Hickman vs. Jones, 9 Wall. 197, 19 L. Ed. 551;

Hepburn vs. Dubois, 12 Pet. 345, 9 L. Ed. 1111;

Ventress vs. Smith, 10 Pet. 161, 9 L. Ed. 382;

Deery vs. Cray, 5 Wall. 785, 18 L. Ed. 653;

Loring vs. True, 104 U. S. 223, 26 L. Ed. 713;

Barreda vs. Silsbee, 21 How. 146, 16 L. Ed. 86;

Gregg vs. Moss, 14 Wall. 564, 20 L. Ed. 740;

Wiggin vs. Burkham, 10 Wall. 129, 19 L. Ed. 884;

Aikens vs. Wisconsin, 195 U. S. 194, 49 L. Ed. 154;

Rogers vs. S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385;

Steever vs. Rickman, 154 U. S. 678, 27 L. Ed. 1052;

Louisville, et. cet. vs. U. S., 238 U. S. 1, 59 L. Ed. 1177;

Mobile vs. Esclava, 16 Pet. 234, 10 L. Ed. 948;

Oratiot vs. U. S., 15 Pet. 336, 10 L. Ed. 759;

Humes vs. U. S., 170 U. S. 210; 42 L. Ed. 1011;

Prentice vs. Lohne, 8 How. 470, 12 L. Ed. 1160;

Lindsay vs. P. Q. Mullen, 176 U. S. 126; 44 L. Ed. 400;

Mills vs. Smith, 8 Wall. 27 ,19 L. Ed. 346;

Smythe vs. Fiske, 23 Wall. 374, 23 L. Ed. 47;

Standard Oil vs. Brown, 218 U. S. 78; 54 L. Ed. 939;

Lancaster vs. Collins, 115 U. S. 222; 29 L. Ed. 373;

Central P. Ry. of Calif., 162 U. S. 91;

Hepburn vs. Dubois (*supra*), 9 L. Ed. 1111;

Eastman Kodak vs. Souther Photo, 273 U. S. 359, 71 L. Ed. 684;

Wilkes vs. Dinsman, 7 How. 89, 12 L. Ed. 618;

G. N. Ry. vs. Donaldson, 246 U. S. 121, 62 L. Ed. 616;

Corrine Mill vs. Toponce, 152 U. S. 405; 38 L. Ed. 493;

Troxell vs. D. L. & W. R. Co., 227 U. S. 434, 57 L. Ed. 586;

C. & N. W. Ry. vs. Ohle, 117 U. S. 123, 29 L. Ed. 837.

Appellant in its brief (p. 17) uncharitably suggests that the rule of liberal construction applicable to war risk insurance cases under the decision of our Supreme Court in *White vs. U. S.,* 270 U. S. 175, 70 Law Ed. 530; *Glazow vs. U. S.,* 50 Fed. (2nd) 178, and *U. S. vs. Messerve,* 42 Fed. (2nd), should be denied the plaintiff in the instant case for the reason that his disability is caused by syphilis. It is sufficient to remark that this court is sitting to pass upon questions of law, and not as a tribunal to sit in moral judgment upon the parties litigant. Yet whatever might be the rule if the incompetent were himself the beneficiary of these funds, we are not in this case called upon to discuss that problem. The fact is that the law by which war risk insurance is provided (38 U. S. C. A. Sec. 511) furnished insurance to those employed in active service not alone for their own protection but in the language of the Act, "for themselves and their dependents." The incompetent will never dispose of or expend the proceeds of his insurance. They will be available for the use and protection of his wife and four children, innocent of any moral obloquy attributable to the father of the household through the nature of his disease, and they directly and indirectly are just as much entitled to the benefit of the rule of liberal construction as any other war risk litigant.

It is apparent that the appellant desires to exclude from the consideration of this court the lay testimony of friends and acquaintances who pictured his condition between the date of his discharge and 1925 when he was medically examined. Objective facts can be proven by lay testimony as well as by medical testimony, even though they bear upon medical issues. Certainly where a disease was shown to have existed during service and where immediately upon discharge and continuously thereafter it was demonstrated that the plaintiff suffered from abnormalities, defects and conditions rendering him unfitted and unable to meet the industrial competition of life, and to earn a livelihood for himself and his family, notwithstanding the burden placed upon him of caring for his wife and his four children and notwithstanding a persistent effort on his part to meet the problem and then finally where medical specialists a few years later, in 1925, identify the symptoms, the abnormalities, and disabling conditions of the plaintiff as diagnostic of the disease of general paralysis of the insane, there is then only one conclusion; that is, that the general paralysis of the insane, discovered by the medical examiners in 1925, existed just so long as the symptoms referable to it existed. These defects and abnormalities, it has

been pointed out, by the testimony were shown to have been continuous from the date of the soldier's return from service.

This question has been excellently disposed of in the 4th Circuit in the case of *Carter vs. U. S.,* 49 Fed. (2nd) 291, cited with approval by our circuit in the *Losson* case, 50 Fed. (2nd) *supra.* Justice Parker, speaking for the 4th Circuit, gives his opinion as follows:

> "The mere fact that a claimant may have worked for substantial periods during the time when he claimed to have been totally and permanently disabled is not conclusive against him. The question is not whether he worked but whether he was able to work * * * . The fact that a man does work is evidence to be considered by the jury as tending to negative the claim of disability, but the fact that he worked when physically unable to do so ought not to defeat his recovery if the jury found that such disability in fact existed."

Again the court says with specific reference to the effect of lay testimony as contrasted with medical evidence in the course of the same opinion:

> "In view of the arguments made before in this and other cases as to the weight to be given to the testimony of physicians we think it well to observe that whether a disability caused by disease be of a permanent character or not is to be determined, not exclusively from the diag-

> nosis made or the opinion given by physicians at the time of the onset of the disease, but by the history of the disease and all the other evidence in the case * * * If the evidence taken as a whole is of such character when viewed in the light most favorable to the plaintiff as reasonably to lead to the conclusion that he was totally and permanently disabled, the issue is for the jury to be decided by them in the light of all the evidence, including the testimony of the physicians.
>
> "For the reasons stated we think that the learned judge below erred in directing a verdict for the defendant."

Therefore it may be concluded that the absence of medical testimony prior to 1925 is unimportant in a case of this character where the disease producing the plaintiff's disability was shown to exist at the date of his discharge, and to have been medically progressive from that date forward and to have made itself manifest by a clear train of unmistakable symptoms from that date to this.

In principle, this case is not unlike the case of *Maleski vs. U. S.*, (43 Fed. 2, 974), in which a comparatively recent medical examination was recognized by the 7th Circuit as sufficient to identify a tubercular condition existing for many years prior to the examination and alleged to have existed ever since the soldier's discharge. Likewise in the case

of *Vance vs. U. S.,* (43 Fed. 2nd 975), the same circuit held lay evidence of a total and permanent disability was sufficient to make a *prima facie* case for the jury, where there was medical evidence based upon an examination shortly prior to the trial establishing a condition sufficient to account for the symptoms put in evidence by lay witnesses existing since the date of discharge.

In the recent case of the *U. S. vs. Riley,* 9th Circuit, the late Justice Rudkin in 43 Fed. 2nd, 203, upheld the sufficiency of lay testimony describing the symptoms of tuberculosis such as weakness, paleness, sickly color, fatigue, night sweats, from the period of the plaintiff's discharge until 1924 on which date he was examined by a physician and found to be suffering from tubercular activity. Such testimony, he held, is sufficient to carry the case to the jury, even though there was other testimony which would warrant a different side.

The Government's position that the plaintiff, because he worked was not as a matter of law totally and permanently disabled, cannot be accepted as the law of War Risk Insurance. The issue is as to the physical and mental condition of the plaintiff. Those who work when they are unfit to do so or who work until they drop dead from exhaustion, or who work

out of a sense of responsibility for relatives or dependents are not barred from recovery upon their insurance policy, if during the period of such employment it be shown that the insured suffers from a disease, wound or disability rendering it impossible for him to pursue continuously a substantially gainful occupation without material injury to his life or health.

See

U. S. vs. Messerve, 44 Fed. 2nd 549;
U. S. vs. Stamey, 48 Fed. 2nd 150;
U. S. vs. Losson, 50 Fed. 2nd 656;
U. S. vs. Burke, 50 Fed. 2nd 657.

The court and jury having seen the witnesses, having tested their credibility, and having determined all conflicting and disputed questions of fact in the plaintiff's favor, such determination is, under the rule of the cases heretofore quoted, conclusive. See also the following cases:

Eastman Kodak Co. vs. Souther Photo Materials Co., 273 U. S. 359, 71 L. Ed. 684;

Shadoan vs. Cincinnati N. O. & T. P. Ry. Co., 220 Fed. 68;

Rochford vs. Pennsylvania Co., 174 Fed. 81;

Lehigh Valley R. Co. vs. State of Russia, 21 Fed. (2nd) 406;

Mutual Investment Co. vs. Shull, 28 Fed. 830;

New York Tel. Co. vs. Beckers, 30 Fed. (2d) 578;

National Fire Insurance Co. vs. Renier, 22 Fed. (2d) 671;

National Biscuit Co. vs. Litzky, 22 Fed. (2d) 939;

Clark vs. McNeill, 25 Fed. (2d) 247;

Hayden vs. U. S., C. C. A., Wn., 1930; 41 Fed. (2d) 614;

Mullivrana vs. U. S., C. C. A., Wash., 1930; 41 Fed. (2d) 734;

LaMarche vs. U. S., C. C. A., Wash., 1928; 20 Fed. (2d) 821;

Whiteside vs. U. S., C. C. A., Ore., 1929; 35 Fed. (2d) 452;

Starnes vs. U. S., D. C., Tex.; 13 Fed. (2d) 212;

McGovern vs. U. S., D. C., Mont.; 294 Fed. 108, (affirmed C. C. A., 1924); 299 Fed. 302, writ of error dismissed 1925, 45 S. C. 351, 267 U. S. 608, 69 L. Ed. 812;

Malaveski vs. U. S., 43 Fed. (2d) 974;

Vance vs. U. S., 43 Fed. (2d) 975;

Ford vs. U. S., 44 Fed. (2d) 754;

Vance, 8 Circ., 48 Fed. (2d) 472;

Stamey, 9th Circ., 48 Fed. (2d) 150;

Sprencel, C. C. A. 5th, 47 Fed. (2d) 501;

Ranes, 9th Circ., 47 Fed. (2d) 582;

Crowell, 48 Fed. (2d) 475.

Reports of Government Physicians Admissible as Official Records.

The appellant's second ground of attack upon the plaintiff's recovery in the court below is predicated upon the claim that the exhibits offered by the plaintiff, consisting of reports of the examination of the plaintiff by physicians on the staff of the U. S. Veterans Bureau, were improperly admitted by the trial court. In its brief, the Government bases its objections on the grounds:

(1) No showing that the doctors were authorized to make the examinations.

(2) That the doctors were not shown to be unavailable.

(3) That the reports are hearsay, containing not what the doctor found, but only what he said he found.

(4) That the reports contain self-serving statements made by the claimant or the insured.

(5) That they deprive the government of the right of cross-examination.

Bill of Exceptions Shows Exhibits Received Without Objection.

A discussion of this question is not properly before the circuit court in this appeal, for the reason that the bill of exceptions contains no record of any objection on the part of the Government to

the receiving of these exhibits in testimony. (R. 34.) Mr. W. A. Schlax, a bureau official, in charge of the records of the plaintiff, was recalled as a witness for the plaintiff, and after producing from the plaintiff's folder the records called for by the plaintiff, testified that these records (Ex. 2 to 15 inc.) were taken from the official records of the U. S. Veterans Bureau, and were or were supposed to be examination reports made of the plaintiff by the bureau doctors. The record and the bill of exceptions then discloses that plaintiff's Exhibits 2 to 15 were received and read in evidence, with no record of any objections whatsoever by the Government.

The record for the review of the circuit court consists entirely of the bill of exceptions. The errors assigned upon appeal as error of law, must be shown to have been objected to, in the course of the trial below, and exceptions allowed thereto must be preserved in the bill of exceptions, otherwise the assignments of error fail, for lack of support by the record. A bill of exceptions must show the motion directed against the admission of evidence, and the ground on which the motion was based.

O'Brien's Manual of Federal Appellate Procedure, p. 33, and note 10, citing 9th circuit cases. See also page 34, and note 14.

> "Every bill of exceptions should point out distinctly the errors of which complaint is made. It ought also to show the grounds relied upon to sustain the objection presented, so that it may appear that the court below was informed as to the point to be decided." *Zoline's Fed. Appellate Jurisdiction and Procedure* (2d Edition), Sec. 678, p. 377.

Review in the circuit court is not an inquiry *de novo* into the issues tried out in the court below, but is restricted to such questions and issues as mere made and considered and decided below. The trial court cannot be guilty of error in a ruling it has never made, or upon an issue to which its attention has never been directed. And more particularly, questions as to the admission and rejection of evidence at law, will be reviewed only when there was an objection and exception, and a *bill of exceptions* to bring it into the record.

> *Cyc. Fed. Procedure,* Vol. VI, p. 580 to 585, inc., Sec. 2973. Also see Sec. 2979.

As to the admission or rejection of evidence, and the necessity for rulings and the ground therefor, to appear in the record, see Sec. 2980, same volume.

Therefore, in the absence of any recorded objection, it is submitted that no complaint against the trial court's admission of these exhibits may now be urged upon appeal.

ADMISSIBILITY OF REPORTS OF BUREAU PHYSICIANS.

We shall discuss the issue of law raised in the appellant's brief upon its merits without in any wise waiving our objection that the exhibits in this particular case were according to the Bill of Exceptions and the Record admitted without objections on the part of the Government. The grounds of objection urged in appellant's brief are after-thoughts of which the appellant failed to give the trial court the advantage.

Rule 4 of the Supreme Court provides:

> "The party excepting shall be required to state distinctly the several matters of law in such charge to which he accepts; and these matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

The same principle guides the appellate court in considering objections based upon admission or exclusion of testimony. Mr. O'Brien in his valuable *Treatise on Federal Procedure* states the rule with apt language in Section 687, page 381, of his manual:

> "A party must make every reasonable effort to secure from the trial court correct rulings, or such, at least, as are satisfactory to him

> before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

The ruling of the trial court, the objection of the party claiming prejudice and the ground thereof must clearly appear in the Bill of Exceptions.

> *Cyc. Fed. Pro.,* Vol. VI, Sec. 2980, and notes thereunder.

It is unnecessary to multiply citations upon this subject for it is elementary in appellate procedure that a party may not claim error for the first time upon review in the appellate court.

Again, however, without waiving our objection to the inadequacy of the record, so as properly to raise the question urged by the appellant, we desire to proceed to a consideration of the propriety of admitting such exhibits in order that the argument of the appellant may not pass unchallenged.

These records were admissible in our judgment under the principles laid down by Wigmore in his *Treatise on Evidence* under the designation of Official Documents or Official Statements. He classifies this exception to the hearsay rule under what he terms "The Principle of Necessity." He declares that while in most exceptions to the hearsay rule

it is necessary to show unavailability, death, absence, insanity or the like, under this particular exception the rigorous application of the principle of necessity is relaxed. Something less than an absolute impossibility is sufficient; the necessity, he states, reduces itself to expediency. It is expedient, he declares, if not practically necessary to accept official statements instead of summoning the official to attend and testify, *viva voce*. In the absence of such an exception Professor Wigmore reasons, "hosts of public officials would be compelled to devote the greater part of their time attending court as witnesses, and the public administration of government would suffer as a consequence." Such statements have, he points out, a strong circumstatial guarantee of trustworthiness, which takes the place of cross-examination.

Another sanction replacing the right of cross-examination which attaches to evidence of this nature laid down by Professor Wigmore is the presumption that public officers do their duty.

There is an official duty to make accurate statements or entries and this will usually invite the officer to its fulfillment. The officer may not be one required to take an express oath of office. It is merely the influence of official duty which pro-

vides the guarantee of trustworthiness justifying the acceptance of such hearsay statements.

Professor Wigmore declares further that no express statute or regulation is needed to create a statutory duty.

Moreover, Wigmore maintains that even where the declarant has a special interest or motive in the making of a representation it seems undesirable to exclude official statements, and he states that the usual judicial attitude favors their admission.

On recognized legal principles, therefore, these documents should be admissible. It is particularly true of the reports of Veteran Bureau physicians. Veterans were by Congress invited to submit to the Veterans Bureau for examination, diagnosis and necessary treatment. They were not to deal with the Government at arm's length. The bureau did not exist to accumulate secret reports against veterans, but rather "to provide a system of relief to persons injured, diseased or disabled in service" (W. W. V. A. Sec. 212, 38 U. S. C. A. 422) and to "insure those in service and to protect them and their dependents." (*In re Stormums Est.,* 1926, 218 N. Y. S. 396). The veteran was encouraged to trust himself to the bureau entirely for treatment

and relief, and the bureau officials, including, of course, their medical staff, were charged with a statutory duty to aid the veterans in securing treatment and any compensation to which they were entitled, or to the benefits of their insurance (W. W. V. A., Sec. ...., 38 U. S. C. A. 432).

Since therefore, these officials were under a duty, both statutory, moral, and imposed by bureau regulations, to record the history, the findings, the diagnosis and prognosis, the sanction of trustworthiness, in lieu of cross-examination, is provided, and under the rules of evidence, the reports themselves can take the place of the public official, in a trial where the subject matter of the report is a material issue. To the same effect see *Jones,* Sec. 1700.

But the appellants urge that the exhibit as a whole is inadmissible because it contains some declarations by the insured in his own interest, and hence improper. The true rule here would be that if such declarations are a necessary part of the record deemed essential to the proper administration of the Veterans Bureau, and the proper adjudication of claims arising under the act, then they become admissible under the foregoing rules.

It is also an answer to point out that if the physicians were personally present, testifying to the results of their own personal examination of the insured at a time *ante litam motam*—for the purpose of determining the necessary measures of hospitalization or treatment, they might under the recognized rules of evidence put in evidence the history given them by the patient with respect to the origin of his disease, and suffering or disability connected with its progress and development.

Wigmore, Sec. 1719 and 1722;
Jones, Sec. 1217.

> "The physician may base his opinion on statements given him by the patient in relation to his condition, past and present. Thus only can the expert ascertain the condition of the party. Where called to give relief from pain and for medical treatment, a statement of pain and suffering, past and present, if necessary to the diagnosis may be testified to by him."

The rule stated by *Greenleaf on Evidence*, and approved by the Supreme Court in *Northern Pac. vs. Urlin*, 158 U. S. 271, is to the same effect:

> "So also the representations by a sick person of the nature of the symptoms and effects of the malady under which he is suffering at the time are original evidence."

This same rule has received a very clear and explicit approval by our own circuit court in the case of the *Union Pacific vs. Novak,* 61 Fed. 573. See also *Abbot's Trial Briefs,* 2d Ed., p. 409, for a statement of the same rule.

It is also worthy of notice, that in every instance, the declarations of the insured to his physicians were borne out and confirmed by the pathological tests and personal medical observation of Veterans' Bureau physicians, who testified in person at the trial, so that it would be futile for the Government to claim prejudice from such records.

Whatever the rule may be under other circumstances, however, it is submitted that the admissibility of these reports has been definitely and finally approved in this circuit in the case of *U. S. vs. Stamey,* 48 Fed. (2d) 150, and in the case referred to therein of *U. S. vs. Cole,* 45 Fed. (2d) 339. In this latter case, the court added.

> "The objection was a general one, and we are not called upon to consider whether the whole record was admissible, or whether the court should only have received such parts as contain material specific findings of fact."

In our case, we find the bill of exceptions silent as to any objection, and further find that the only

objection made at all at the trial, which was not incorporated in the bill of exceptions, was the general objection that they are hearsay, in that they deprive the defendant of cross-examination. This argument was adequately answered in the *Stamey* and *Cole* cases, *supra,* as well as in the case of *McGovern vs. United States,* 294 Fed. 108, affirmed 299 Fed. 302. In other circuits see the following cases, approving the admissibility of these reports:

U. S. vs. Worley, 42 Fed. (2d) 197;
U. S. vs. Sprencel, 47 Fed. (2d) 501;
Nichols vs. U. S., 48 Fed. (2d) 203;
U. S. vs. Westcoat, 49 Fed. (2d) 193.

In conclusion, it is respectfully submitted that the evidence was such as to warrant submission to the jury; the medical reports were properly received into evidence by the trial court, and the judgment of that court should be affirmed.

Respectfully,
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